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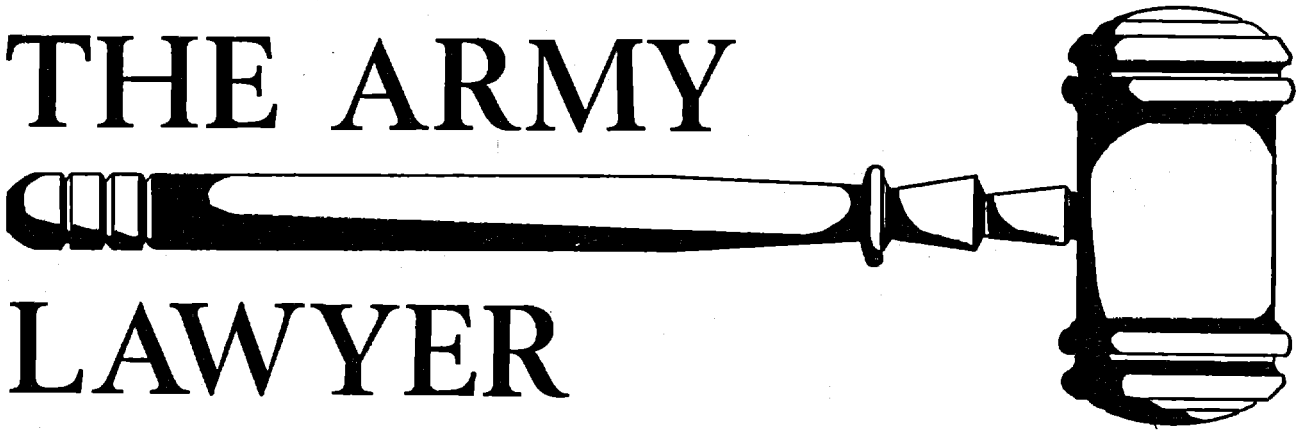

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Table of Contents

The 1984 Manual for Courts-Martial: Significant Changes and Potential Issues

The Instructors of the Criminal Law Division, TJAGSA

I. Introduction

The Manual for Courts-Martial, 1984, goes into effect on 1 August. The new Manual updates and reorganizes past procedure, and implements case law changes and the Military Justice Act of 1983. While the basic structure of military law procedure will remain the same, the 1984 Manual creates new law and procedures in many areas.

The purpose of this article is to highlight significant changes in the 1984 Manual. This review is not an exhaustive analysis of all minor procedural changes; it is intended to alert military practitioners to the major innovations and their possible effect on the day-to-day practice of military justice.

The article is organized, like the new Manual, in trial chronology. The discussion of the Rules for Courts-Martial (R.C.M.) is followed by discussion of Part IV (Crimes and Defenses), Part V (Nonjudicial Punishment), and Constitutional Evidence (generally based on amendments to the Military Rules of Evidence, Part III of the 1984 Manual).

This article was prepared by the instructors

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Major Patrick Finnegan — Pretrial Restraint and Confinement; Pretrial Processing; Immunity; Speedy Trial; Summary Courts-Martial.

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Major Alan K. Hahn — Crimes and Defenses; Eyewitness Identification.

Major Stephen D. Smith — Pretrial Agreements; Pleas; Fourth Amendment Issues.

II. General Provisions

A. Rules of Court

The President has for the first time expressly authorized rules of court. Prior to the 1984 Manual for Courts-Martial (1984 Manual), military judges relied upon the general language of Article 26 of the Uniform Code of Military Justice (UCMJ) and paragraph 39 of the 1969 Manual for Courts-Martial (1969 Manual) or their inherent authority to make rules of court in their jurisdictions. The authority of judges to make such rules and to enforce them was frequently attacked,[1] but the authority is now clear in Rule for Courts-Martial (R.C.M.) 108.

Rules of court may be made by The Judge Advocate General. More likely, however, the authority will be delegated, perhaps to the Chief Trial Judge. The rules may be service-wide, by circuit, at the trial judge level, or a combination of these.

Enforcement of many rules of court may be accomplished by the contempt power, where

[1] *See, e.g.*, United States v. Kelson, 3 M.J. 139 (C.M.A. 1977).

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appropriate.[2] This will include military personnel or civilians (except foreign nationals outside the territorial limits of the United States) who commit a contempt in the courtroom or outside the courtroom in places such as the waiting area or the deliberation room.

The very limited nature of contempt in the military has not changed; non-tumultuous violations of the rules of court may have to be handled by other means. For example, R.C.M. 109(b) recognizes the power of any of The Judge Advocates General to suspend a person from practice before courts-martial. Specific Army procedures for such suspensions are detailed in Chapter 16 of AR 27-10.

R.C.M. 108, when combined with the enforcement powers in R.C.M.s 109, 801, and 809, clearly enhances the power and prestige of the military trial judge.

B. Professional Supervision of Military Judges and Counsel

R.C.M. 109 provides that The Judge Advocate General of each service may prescribe rules to supervise and discipline *military judges*, judge advocates, and civilian attorneys who practice in *proceedings governed by the 1984 Manual.* The only enforcement mechanism specifically cited in the rule is suspension from practice in courts-martial. This rule expands the coverage provided in paragraph 43, MCM 1969, by specifically including military trial and appellate judges, and by including civilian attorneys who practice in *any proceedings* governed by the 1984 Manual, not just courts-martial. These expansions should have little practical significance.

Although the 1969 Manual does not specifically say that The Judge Advocate General has the authority to prescribe rules to supervise and discipline military judges, this control has been exercised based on regulation.[3]

R.C.M. 109 also purports to cover the conduct of civilian attorneys, not only in courts-martial proceedings but also in other matters such as nonjudicial punishment and post-trial matters relating to courts-martial. How far the military can actually go in controlling the conduct of a civilian attorney is open to debate. Although professional responsibility standards are generally thought to have extraterritorial application,[4] it is not clear where the jurisdiction of a licensing state ends and the jurisdiction of the military begins.[5] It should also be noted that R.C.M. 109 does not cover the conduct of lay persons (such as clerical personnel or lawyer's assistants) involved in military justice.

III. Pretrial Procedure

A. Jurisdiction

The 1984 Manual has a subtle, refining effect on the jurisdictional aspects of court-martial practice. Part I. Preamble, describes the general nature of military jurisdiction and the agencies which may exercise various aspects of such jurisdiction. R.C.M. 103 includes definitions of several relevant words and phrases affecting jurisdictional considerations.[6]

R.C.M. 201 addresses jurisdiction generally, and the rule is heavily supplemented by the Discussion. The substantive changes that were made occur in R.C.M. 201(b). Traditionally,

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[2]Rule for Courts-Martial 809 covers contempt in the military.

[3]U.S. Dep't of Army, Reg. No. 27-10, Legal Services-Military Justice, paras. 16-9 to -13 (1 Nov. 1982) [hereinafter cited as AR 27-10]; U.S. Dep't of Army, Reg. No. 27-1, Legal Services-Judge Advocate Legal Services, paras. 18-25 (IC2, 1 Nov. 1982).

[4]*See, e.g.*, Model Rules of Professional Conduct Rule 8.5 (1983).

[5]This situation can arise as follows:

A civilian lawyer is licensed in State A and is engaged in general practice there. This practice includes the occasional representation of servicemembers from the nearby military installation. State A permits lawyer advertising. After seeing an ad in the local paper, Private X retains the civilian lawyer for advice and representation concerning pending nonjudicial punishment. During the course of consultation Private X discloses to the civilian lawyer that he intends to steal official documents from his personnel file. The ethics standards of State A prohibit disclosure of this information.

If The Judge Advocate General has adopted rules which prohibit any lawyer advertising and which require disclosure of a client's intent to commit a future crime, can this civilian lawyer be suspended from practicing in courts-martial?

[6]For example, the rule defines "active duty", "active status", and "inactive-duty training", in addition to containing definitions of several components of the Armed Forces.

court-martial jurisdiction has been said to have four elements: jurisdiction over the offense, jurisdiction over the person, proper composition, and being convened by a proper authority.[7] To these four requisites for court-martial jurisdiction has been added the requirement that "[e]ach charge before the court-martial must be referred to it by competent authority."[8] Additionally, the rule confirms that "[a] court-martial always has jurisdiction to determine whether it has jurisdiction."[9]

R.C.M. 202 concerns jurisdiction over the person and R.C.M. 203 deals with jurisdiction over the offense. For both rules the Discussion is a necessary and useful supplement and together with the cases cited in the Analysis[10] of the two rules, gives the practitioner broad guidance for researching jurisdictional issues.

The Discussion under R.C.M. 307(c)(3) addresses the requirement to plead the government's jurisdictional basis for a specification, as required by the Court of Military Appeals in *United States v. Alef.*[11] Sample specifications, formerly gathered together in Appendix 6c of the 1969 Manual are now located in Part IV, Punitive Articles.[12] Individual offenses are addressed in separately numbered paragraphs which contain suggested forms of pleadings. The sample specifications also contain reminders to plead the jurisdictional data required by *Alef*, although the 1984 Manual does not specifically adopt the *Alef* requirement.

B. Pretrial Restraint and Confinement

The 1984 Manual makes several substantive changes in the area of pretrial restraint. These changes are likely to have an immediate impact on who is restrained and what type of restraint is imposed. The rules on pretrial restraint (R.C.M. 304—Pretrial Restraint and R.C.M. 305—Pretrial Confinement) also formalize procedures for review of pretrial confinement. Commanders, as well as judge advocates, must be familiar with these rules and how they will be applied for the commander plays an integral part in the procedure.

R.C.M. 304, the more general rule, describes policies applicable to all forms of pretrial restraint. The rules pertaining to restraint—who may order restraint, when people can be restrained—apply equally to pretrial confinement, the most severe form of pretrial restraint.

R.C.M., 304(a) lists four types of restraint: conditions on liberty; restriction; arrest; and pretrial confinement. The change is the new type restraint called "conditions on liberty," defined as "orders directing a person to do or refrain from doing certain acts." That means that if a soldier is involved in a brawl at Alice's Restaurant and the commander orders him not to go to the restaurant any more, the commander has imposed a "condition on liberty." The same thing has occurred if two soldiers are involved in a barracks fight and the platoon leader orders one to stay away from the other: he has imposed a condition on liberty.

An issue may arise concerning whether actions not previously considered as related to pretrial restraint such as suspension of privileges will constitute a condition on liberty. For example, a soldier who is suspected of committing an offense downtown may lose pass privileges, or a commander as a matter of policy may suspend leave for soldiers who are under investigation. Are those lost privileges conditions on liberty?

The significance of all forms of restraint, including conditions on liberty, is that *any* form of pretrial restraint starts the speedy trial clock running.[13] Commanders must be educated

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[7]*See* Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter cited as MCM, 1969].

[8]Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 201(b)(3) [hereinafter cited as R.C.M.] The format of the 1984 Manual differs significantly from prior Manuals. The new format is intended to make the manual easier to read and use. Additionally, the excellent and comprehensive Index to the 1984 Manual should prove invaluable.

[9]R.C.M. 201(b).

[10]The Analysis to the Rules for Courts-Martial is at Appendix 21 of the 1984 Manual [hereinafter cited as Analysis].

[11]3 M.J. 414 (C.M.A. 1977).

[12]*See also infra* notes 141-169 and accompanying text.

[13]*See also infra* notes 82-86 and accompanying text.

about the effect of all types of restraint, even those that they may have previously considered routine policy. Commanders must keep their trial counsel informed about restraint to lessen the chances of accidentally triggering the speedy trial clock, and they should be more circumspect about restraining the freedom of the potential accused. The other effect of "conditions on liberty" is that it, like all other forms of restraint, triggers the accused's right to counsel at a pretrial lineup.[14]

Who may order restraint and the criteria for when a person may lawfully be restrained are unchanged from current law. Soldiers under pretrial restraint must be informed of the underlying offense. Pretrial confinement is imposed by written orders (typically, a confinement order); other types of restraint are imposed by an oral or written notification that includes the terms or limits of the restraint. The new Manual expressly restates the rule that pretrial restraint cannot be used as punishment.[15]

R.C.M. 305 deals specifically with pretrial confinement and makes several significant changes. These include a new basis for confinement that is arguably a form of "preventive detention," a formal system of review of the legality and propriety of confinement, specific authority for the military judge to order release, and a new remedy for illegal confinement.

An accused who is to be confined must be informed of the offenses for which confined, the review procedures, the right to remain silent, and the right to counsel.[16] If requested by the accused, military counsel must be provided before the initial review of confinement by the magistrate. The rule is silent concerning who must inform the accused of these rights, allowing the government considerable flexibility. Failure to comply with the notice requirements does not make the confinement illegal, but violations will be tested for specific prejudice. Normal practice might be to have the defense counsel who sees the accused prior to confinement give the required notice, but the government should be wary of relying on that method. If the issue arises of whether the accused was properly advised, the defense counsel would almost certainly not testify because of the attorney-client privilege. The counsel provided to the accused for purposes of pretrial confinement is not required to be the same counsel that will be detailed to the case, but, as a practical matter, that is likely to result. The accused has *no* right to individually requested counsel for the purpose of pretrial confinement review.

Once the accused has been confined, only certain specific persons can order release. Any commander of the prisoner may order release, although this is probably limited in the same way in which any commander may confine: higher level commanders can withhold the authority to order confinement or release. The military magistrate who reviews confinement may order release, and, *after* the charges are referred to trial, so can the military judge.

The initial confinement decision is normally made by the accused's commander, who must review the validity of the confinement within seventy-two hours. This review will ordinarily be done at the time pretrial confinement is actually ordered. If the commander who orders confinement takes the proper steps at the time of confinement, there is no need for a review by the same commander seventy-two hours later. The commander must make basically the same determination that is made under current law: that less severe restraint would be inadequate and that the prisoner is either a flight risk or will foreseeably engage in serious criminal misconduct. The rule and its Discussion make it clear that the first criterion concerning lesser restraint means only that the commander must *consider* lesser forms of restraint and determine them inadequate. The intent of the drafters by including and defining the phrase "serious criminal misconduct" is to create a slightly broader basis for allowing pretrial confinement —a basis that will permit confinement of a soldier who disobeys orders and refuses to perform duties. If the commander determines that this soldier's quitting will threaten the effectiveness, morale, discipline, or readiness of the com-

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[14]*See also infra* notes 226-238 and accompanying text.

[15]R.C.M. 304(f).

[16]R.C.M. 305(e).

mand, pretrial confinement is permissible.[17]

The commander who orders confinement must prepare and forward to the magistrate a written memo detailing why confinement is appropriate and necessary. For Army personnel this is already required by AR 27-10 which provides a pretrial confinement checklist.

R.C.M. 305(i) sets up specific procedures for review of confinement. The review procedure is similar to what the Army already provides with its system of review of confinement by a military magistrate. Within seven days, a neutral and detached official must review the legality of the confinement. The time period can be extended to ten days for good cause. The magistrate reviews the commander's memo and any additional matters, including anything submitted by the accused. The review process has the potential to become a mini-adversarial hearing because the accused and counsel are permitted to appear before the magistrate and make statements, and the command is also permitted to have a representative appear and make a statement. The difference in the language of the rule, though, is that the accused and counsel "shall be allowed" to appear, absent unusual circumstances, while the command's representative "may appear."[18] This seems to leave the decision on whether to hear the command's representative to the discretion of the magistrate. Although the review hearing may be "contested," it should not become a full adversarial hearing because the rules of evidence do not apply and there is no right to call or cross-examine witnesses. The command must show that the requirements for confinement are met by a preponderance of the evidence, and the magistrate is required to set out factual findings and conclusions in a written memo, available to either party on request.

The written memo of the magistrate may become particularly important if the defense counsel takes advantage of R.C.M. 305(j) to request that the military judge, once the case has been referred, review the propriety of continued confinement. This rule gives the defense two chances to ligitate the issue—first with the magistrate, later with the military judge. The judge's release powers are limited, however, and he or she may order release only if:

(1) The magistrate's decision was an abuse of discretion and no information is presented to the judge justifying confinement; or

(2) Information that was not presented to the magistrate shows that the accused should be released; or

(3) There was no magistrate's review and the judge determines that the requirements for confinement are not met.[19]

R.C.M. 305(k) contains a specific remedy for illegal pretrial confinement, although the rule limits what violations constitute illegal confinement. For all confinement served as a result of abuse of discretion (that is, if a judge finds that the magistrate abused his discretion in approving confinement or, arguably, that a commander abused his discretion when ordering a soldier confined; or failure to provide military counsel, if requested, before the review; or failure by the commander to comply with the procedures for action within seventy-two hours and consideration of the reasons for confinement; or failure to comply with review procedures) the military judge orders administrative credit against the adjudged sentence. When the new Manual was initially drafted, the credit was at a rate of one and one-half days credit per day of illegal confinement. After the Court of Military Appeals decided in *United States v. Allen*[20] that all accused were entitled to credit for *all* pretrial confinement, illegal or not, the draft 1984 Manual Provision was revised to require a one-for-one credit against the sentence for illegal confinement. This is in addition to *Allen* credit, however. That means that an accused who is in pretrial confinement receives day-for-day credit *in addition to* an additional day's credit for each day of confinement that is determined

[17]R.C.M. 305(h)(2)(B) and the Analysis thereto.

[18]R.C.M. 305(i)(3)(A).

[19]R.C.M. 305(j)(1).

[20]17 M.J. 126 (C.M.A. 1984).

to be illegal.[21] An accused could receive double credit if the entire period of confinement was illegal.

The rule also changes case law concerning confinement after release. R.C.M. 305(1) says that a prisoner released by proper authority may not be reconfined unless there is new misconduct or new evidence that justifies confinement. This is contrary to current case law from the Army and Navy-Marine Corps Courts of Military Review that allowed the military judge to override a magistrate's release order and reinstate the confinement.[22]

The likely result of the changes in pretrial confinement in the Rules for Courts-Martial and recent court-ordered changes is that fewer soldiers will be confined awaiting trial. Commanders will be wary of implicating uncertain speedy trial rules and the required credit for confinement will deter pretrial confinement except in the most serious cases. Soldiers whose offenses will typically be handled at a bad-conduct discharge special court-martial are likely to receive credit that is almost the equivalent of their sentence to confinement. Then, if the proper procedural steps under the R.C.M. have not been taken, additional credit will be given. Defense counsel will be unlikely to rush into court with their clients who are in confinement and going to either level special court-martial. The more pretrial confinement they serve, the less post-trial jail time. Once the rough edges of the new system are worked out, it may be that only soldiers who are going to be tried by general court-martial will be placed in pretrial confinement; that is probably not a bad result given the reasons for confining persons before trial and the lack of bail in the military.

C. Pretrial Processing

The procedure for processing charges for trial or other dispositions remains substantially the same under the 1984 Manual. Some minor changes in the process are worthy of note, although they are unlikely to have any profound impact. The main rules that deal with the pretrial process are R.C.M. 306 (Initial disposition), R.C.M. 307 (Preferral of charges) and R.C.M.s 401, 402, 403, 404 and 407 (dealing with forwarding and disposing of charges by various level commanders). Other rules concern specific subject areas of pretrial processing (*e.g.*, Article 32 investigations and referral of charges) and are dealth with in other sections of this article.

R.C.M. 307(a) addresses who may prefer charges and makes a slight change to when an order to prefer charges may be given. The Discussion to the rule states that a person unable to truthfully make the oath concerning the charges may not be ordered to prefer charges. Of course, the person who orders another to prefer charges becomes a nominal accuser and is disqualified to act as a convening authority for special or general courts-martial.

R.C.M. 307(c) gives practical advice on how to prefer charges and subsection (c)(4) states that charges and specifications alleging all known offenses by an accused *may* be preferred at the same time. This is much less restrictive than the 1969 Manual which required that all known charges be brought simultaneously, but which had a conflicting provision forbidding the joinder of major and minor offenses. This rule and R.C.M. 601(e)(2), which eliminates the restriction against joining major and minor offenses, give more flexibility to the convening authority and may be particularly helpful to the prosecution for inducing a recalcitrant accused to trial. With more flexible guidelines on pretrial agreements and recognition of the give and take of pretrial negotiations, the government may be able to make a pretrial agreement (which still must be initiated by the accused) more attractive by promising not to prosecute other known offenses that have not yet been preferred.

R.C.M. 308 concerns notification to the accused of the charges and contains the provision that the accused must be notified both of the name of the person who preferred charges *and* the person who ordered charges preferred. This

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[21]This is contrary to interpretations of the effect of *Allen* by the Navy-Marine Corps and Air Force Courts of Military Review, which have held that credit for illegal confinement is subsumed into *Allen* credit. *See, e.g.*, United States v. Shea, 17 M.J. 966 (A.F.C.M.R. 1984).

[22]United States v. Montford, 13 M.J. 829 (A.C.M.R. 1982); United States v. Dick, 9 M.J. 869 (N.C.M.R. 1980).

is a means of notifying the accused of the nominal accuser, if any. As the new Manual points out, however, the best way to avoid litigation concerning nominal accusers is not to have them.

The rules in Chapter IV concern forwarding and disposition of charges by commanders at various levels, from those not empowered to convene courts (the battery or company commander) up to the general court-martial convening authority. The rules do not change current practice, but do list special court-martial convening authorities and their disposition alternatives separately, rather than combining them with summary court-martial convening authorities as the 1969 Manual did.

D. Article 32 Investigation

The Rules for Courts-Martial make a number of procedural changes affecting the conduct of Article 32, UCMJ investigations. While most of the changes reflect current practice as developed by case law, two new provisions may significantly change Article 32 practice.

There are five areas where R.C.M. 405 attempts to codify or clarify current practice. First, the new rule recognizes that the Article 32 investigation fulfills a discovery role. The drafters expressly state so in the Discussion to R.C.M. 405 and implement the idea through a broad defense right to compel production of reasonably available witnesses and evidence. Although case law has long recognized a discovery purpose to the Article 32 investigation,[23] this aspect of Article 32 should take on new significance in light of the reciprocal discovery provisions of R.C.M. 701.[24] In a jurisdiction where the trial counsel releases information to the defense only when required to do so, the defense counsel can request production of documents or reports at the Article 32 investigation and arguably avoid triggering reciprocal discovery obligations under R.C.M. 701(b)(3) and (b)(4).[25]

Second, R.C.M. 405(c) provides that any convening authority can appoint an Article 32 investigating officer and order an investigation. The 1969 Manual was unclear as to who actually had authority to order an Article 32 investigation,[26] although in practice it was generally assumed that any convening authority had that authority.

Third, R.C.M. 405(k) provides that an accused can waive the right to have an Article 32 investigation. In *United States v. Schaffer*,[27] the Court of Military Appeals reviewed the practice of including waiver of the Article 32 investigation as a term of a pretrial agreement. Although the court held that waiver did not violate public policy, they relied in part on the procedural protections afforded an accused to insure against prosecutorial overreaching. The court's condonation of waiver was made in the context of an accused seeking concessions from a convening authority by offering to waive the Article 32 investigation as an inducement. Whether the court would condone a convening authority's practice of routinely requiring waiver of the Article 32 investigation as a precondition to entering into a pretrial agreement remains to be seen.[28]

Fourth, R.C.M. 405(g)(1) outlines the tests to be used in determining when defense requested

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[23]*See, e.g.*, United States v. Roberts, 10 M.J. 308 (C.M.A. 1981); Hutson v. United States, 19 C.M.A. 437, 42 C.M.R. 39 (1970); United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280 (1959).

[24]*See infra* notes 59-63 and accompanying text.

[25]R.C.M. 701(b)(3) and (b)(4) provide that the defense opens itself to reciprocal discovery "when the defense requests disclosure under" subsections (a)(2)(A) and (a)(2)(B) of R.C.M. 701. No mention is made of defense requests for information made pursuant to any other authority.

[26]*See* MCM, 1969, para. 33*e* (summary court-martial convening authority has the authority to order an Article 32 investigation); MCM, 1969, para. 35*a* (general courts-martial convening authorities have the same authority to dispose of charges as the summary court-martial convening authority). Although the 1969 Manual does not specifically say that special courts-martial convening authorities can order an investigation, it is routinely done.

[27]12 M.J. 425 (C.M.A. 1982).

[28]R.C.M. 705(d)(2) allows the convening authority, staff judge advocate, or trial counsel to propose terms for a pretrial agreement once the defense counsel initiates the general offer to plead guilty. *See infra* notes 68-78 and accompanying text.

witnesses and evidence must be produced at the Article 32 hearing. A requested witness must have testimony relevant to the investigation and noncumulative with other testimony presented. In addition the witness must be "reasonably available." Relevant, noncumulative witnesses are not reasonably available if they are unavailable under Military Rule of Evidence 804(a)[29] *or* when the significance of the personal appearance of the witness is outweighed by the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance. This test for production codifies and amplifies the standard announced by the Court of Military Appeals in *United States v. Ledbetter.*[30]

R.C.M. 405(g)(1)(B) adopts a parallel test for when defense requested evidence must be produced. Relevant, noncumulative evidence must be produced if it is in the government's control and is "reasonably available." Reasonable availability is measured by balancing the significance of having the evidence against the difficulty, expense, delay, and effect on military operations of obtaining the evidence.

Left unresolved is whether the defense must attempt to secure some alternative to production, such as a deposition of the witness, to preserve witness denial motions at trial.[31]

Finally, R.C.M. 405(g)(2) clarifies who makes the determination of reasonable availability for defense requested witnesses and evidence. The initial decision in every case is made by the investigating officer. The investigating officer's decision that the witness or the evidence should be produced can be vetoed. The immediate commander of a military witness can override the determination that the witness is reasonably available. Likewise, the custodian of requested evidence can override the investigating officer's determination that the evidence is reasonably available. A decision to produce a civilian witness can be nullified in two ways. First, the civilian witness can refuse to appear.[32] Second, the general court-martial convening authority can refuse to authorize payment of transportation expenses and per diem allowances.[33] The final review of any determination of nonavailability is made at trial by the military judge.

The two new provisions which have the most potential to significantly change practice at the Article 32 hearing are important for related reasons, yet only one provision was intended to be a change from current practice. First, the drafters intended to require timely defense objection to any defect relating to the Article 32 investigation. This policy is not only efficient[34] but consistent with the new speedy trial policy of R.C.M. 707.[35] There are separate timeliness

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[29]M.R.E. 804(a) provides that:

"Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or
(3) testifies to a lack of memory of the subject matter of the declarant's statement; or
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means; or
(6) is unavailable within the meaning of Article 49(d)(2).

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim or lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

[30]2 M.J. 37 (C.M.A. 1976).

[31]*See, e.g.*, United States v. Chuculate, 5 M.J. 143 (C.M.A. 1978).

[32]R.C.M. 405(g)(2)(B) (Discussion) (there is no authority to compel a civilian witness to attend an Article 32 investigation).

[33]AR 27-10, para. 5-12(c) (Proposed Revision) ("civilian witnesses...will not be requested to appear until payment of their transportation and per diem expenses has been approved by the GCM authority").

[34]R.C.M. 405(k) (Analysis) (the defense should raise objections when they can most easily be remedied).

[35]*See infra* notes 82-86 and accompanying text.

standards for objecting to defects in the investigative procedures and for challenging defects in the report of investigation. Defects in the investigation procedures must be made known to the investigating officer promptly upon discovery of the alleged error. The investigating officer can either correct the defect or note the objection in the report of investigation.[36]

Defects in the formal report (to include a failure of the investigating officer to note a prior objection to a defect in procedure) must be reported to the officer ordering the investigation no later than five days after the accused receives the report of investigation.[37]

Any objection not made in a timely manner is waived absent a showing of good cause. Objections which go unresolved after a timely objection can be raised in a motion for appropriate relief prior to entry of a plea at a general court-martial.[38] Under the 1984 Manual, defense counsel have a much heavier burden to act early to preserve objections at trial. The best defense strategy will probably be to be aggressive in asserting objections. Among other reasons, this is true because the importance of a specific defect may not be readily apparent at the time it occurs; relief may eventually be based on prejudice caused by cumulative defects, and being able to compel a re-opening of the Article 32 investigation may have important speedy trial ramifications.

The second significant new provision of R.C.M. 405 concerns the investigating officer's consideration of alternatives to testimony[39] and to evidence.[40] Although the drafters did not intend to change current practice,[41] the language used in drafting these provisions suggests fertile new ground for defense objection.

Under paragraph 34, MCM 1969, sworn statements of witnesses could be considered by the investigating officer regardless of whether the witness was available or whether the defense objected. Physical evidence and documentary evidence could be considered in almost any form. The only clear prohibition was that unsworn witness statements could not be considered over defense objection. The Military Rules of Evidence did not apply to Article 32 investigations.[42]

Although the Military Rules of Evidence still do not apply to Article 32 investigations,[43] R.C.M. 405 is drafted in such a way that the investigating officer is arguably prohibited from considering sworn statements of available witnesses over defense objection.[44] If the actual evidence is reasonably available and the defense counsel objects, the investigating officer is also arguably prohibited from considering any testimony describing the evidence or any authenti-

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[36]R.C.M. 405(h)(2).

[37]R.C.M. 405(j)(4).

[38]R.C.M. 405(a) (defects in the investigation have no effect if the charges are not referred to a general court-martial); R.C.M. 906(b)(3).

[39]R.C.M. 405(g)(4).

[40]R.C.M. 405(g)(5).

[41]R.C.M. 405(g) (Analysis).

[42]M.R.E. 1101(d).

[43]*Id.*

[44]R.C.M. 405(g)(4) provides the following guidance for consideration of alternatives to testimony:

(4) *Alternatives to testimony.*

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the witness:

(i) Sworn statements;

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed;

(iii) Prior testimony under oath;

(iv) Depositions;

(v) Stipulations of fact or expected testimony;

(vi) Unsworn statements; and

(vii) Offers of proof of expected testimony of that witness.

(B) The investigating officer may consider, over objection of the defense, when the witness is not reasonably available:

(i) Sworn statements;

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed;

(iii) Prior testimony under oath; and

(iv) Depositions of that witness.

cated copy, photograph, or reproduction of the evidence.[45]

A more tenuous argument can be made that if the defense counsel objects, the investigating officer is *always* prohibited from considering testimony describing evidence or any authenticated copy, photograph, or reproduction of the evidence. An innovative defense counsel could even argue that the inference to be drawn from R.C.M. 405(g) is that unauthenticated copies, photographs, or reproductions of evidence can *never* be considered. Although contrary to the clear intent of the drafters,[46] the language in the rule is susceptible to this interpretation.

E. Pretrial Advice

One of the most significant changes in military practice could come from R.C.M. 406, which implements fundamental changes in the pretrial advice prescribed in the Military Justice Act of 1983.[47] R.C.M. 406 is designed to take legal determinations in general courts-martial away from the convening authority and place them in the hands of the staff judge advocate. This has the positive collateral effect of eliminating a source of legal error and streamlining the system.

The new pretrial advice is legally sufficient if it contains the staff judge advocate's conclusions that the specifications allege offenses under the Uniform Code of Military Justice, that the specifications are warranted by the evidence indicated in the report of investigation, and that the court-martial would have jurisdiction over the accused and the offenses. The staff judge advocate is also required to recommend what action the convening authority should take. It is acceptable for the staff judge advocate to put more in the pretrial advice, so long as it is accurate, but no more is required. Sample pretrial advices are attached as Appendix A.

How much *should* a staff judge advocate put into a pretrial advice? To a large extent the answer to this question will be provided by the convening authority. The discussion to R.C.M. 406 says that "when appropriate" the advice should include a brief summary of the evidence; a discussion of aggravation, extenuation, and mitigation; and the recommendations as to disposition by subordinate commanders. Even though the legal determinations belong to the lawyer, the convening authority still decides the level of disposition and still can dismiss the charges. If the convening authority wants a brief synopsis of the evidence to help make an informed decision, the pretrial advice remains the appropriate vehicle.

As a practical matter, providing a more complete pretrial advice should not impose a substantial burden on the military justice system. Inaccuracies or defects in the pretrial advice rarely provide a ground for relief.[48] In addition, although streamlining the justice system has merit, it is not clear that a short-form pretrial advice actually will reduce the workload for the

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[45]R.C.M. 405(g)(5) provides the following guidance for consideration of alternatives to evidence:

(5) *Alernatives to evidence.*

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the evidence:

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence;

(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described;

(iv) A stipulation of fact, document's contents, or expected testimony;

(v) An unsworn statement describing the evidence; or

(vi) An offer of proof concerning pertinent characteristics of the evidence.

(B) The investigating officer may consider, over objection of the defense, when the evidence is not reasonably available.

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence; or

(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described.

[46]R.C.M. 405(g) (Analysis).

[47]Pub. L. No. 98-209, 97 Stat. 1393 (1983) (amending the Uniform Code of Military Justice arts. 1-140, U.S.C. §§ 801-940 (1982)) [hereinafter cited as Military Justice Act of 1983].

[48]*See, e.g.*, United States v. Kemp, 7 M.J. 760 (A.C.M.R. 1979) (defects in the pretrial advice warrant relief at trial only if the defect was so substantial that the convening authority would likely have ordered a different disposition of the charges).

staff judge advocate office. While the conclusions and recommendations in the pretrial advice must belong to the staff judge advocate, it is unreasonable to believe that the staff judge advocate will personally read every Article 32 report, personally analyze every aspect of the case, and personally draft the advice. The most efficient way to process cases is to have someone else read the case file and prepare a memorandum to assist the staff judge advocate in making a decision. This memorandum should, in most instances, be readily convertible into a long-form pretrial advice.

Perhaps the most significant long term consequence of R.C.M. 406 is the fact that the pretrial advice now takes some prosecutorial discretion away from the convening authority. Under the 1969 Manual the pretrial advice was purely advisory. Now the staff judge advocate can preclude referral of a specification to a general court-martial[49] by stating that the specification does not allege an offense, is not warranted by the evidence in the Article 32 investigation, or is not subject to court-martial jurisdiction. While this in itself is a significant change, potentially more important changes could flow from the appellate courts if they determine that the new provisions change the fundamental nature of the pretrial advice or alter the role of the staff judge advocate in the military justice system.

If the pretrial advice has been converted from a "prosecutorial tool"[50] to a screening device to protect the accused against baseless charges, the accused might be entitled to a more thorough advice than currently contemplated by the new Manual. To the extent that the staff judge advocate now performs a magistrate-type function, the courts could conceivably determine that these legal determinations are quasi-judicial. The question then would be whether the trial counsel could provide an *ex parte* analysis of the case to assist the staff judge advocate in drafting the pretrial advice.[51]

At a minimum, the staff judge advocate now exercises a limited form of prosecutorial discretion. This carries with it the ethical obligation not to cause criminal charges to be instituted when it is obvious that the charges are not supported by probably cause.[52]

F. Detailing Members, Military Judge, and Counsel

The procedures for detaining court personnel are substantially changed by R.C.M. 503. The convening authority will detail only the members. The military judge will be detailed in accordance with the regulations of each service. The Army has given the Chief Trial Judge the authority to detail the military judge, and this authority may be further delegated to general court-martial military judges.[53] Frequently, the general court-martial judge will detail himself or herself and will also detail the local special court-martial military judge.

Trial and defense counsel will similarly be detailed in accordance with service regulations. Authority to detail the trial counsel will be exercised by the staff judge advocate or by his or her delegate.[54] Authority to detail the defense counsel will be exercised by the Chief, U.S. Army Trial Defense Service, or by his or her delegate (likely to be the regional defense counsel or senior defense counsel).[55]

The detail of counsel and the military judge may be either written and included in the record of trial or announced orally on the record at the court-martial; counsel and the judge will no longer be listed in the convening order.

R.C.M. 503 should result in less paperwork and a streamlined method for detailing court-martial personnel. While the members will still be selected personally by the convening authority and detailed in a written order, the counsel and the military judge may be detailed orally. The counsel and the military judge need only state on the record their qualifications, status as

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[49]R.C.M. 406 does not prohibit a convening authority from referring a specification to any inferior court regardless of the legal conclusions of the staff judge advocate.

[50]United States v. Hardin, 7 M.J. 399 (C.M.A. 1979).

[51]*See, e.g.*, United States v. Payne, 3 M.J. 354 (C.M.A. 1977).

[52]Model Code of Professional Responsibility DR 7-103(A).

[53]AR 27-10, Para. 8-6 (Proposed Revision).

[54]AR 27-10, Para. 5-3*a* (Proposed Revision).

[55]AR 27-10, Para. 5-4*a* (Proposed Revision).

to oaths, and that they have been properly detailed by a person with proper authority.

As judges and counsel become familiar with this somewhat loose method of detail, it is inevitable that the oral announcement will occasionally be forgotten. For counsel, an irregularity in the detail would not require reversal unless the accused has been prejudiced. The same rule would apply to the detail of the military judge, so long as the judge was qualified under Article 26, UCMJ.

G. Referral

The essence of the convening authority's referral of a case to court-martial has not changed. R.C.M. 601, however, contains several changes from past practice. A convening authority may only refer a case to trial if the convening authority personally finds, or is advised by a judge advocate, that there are reasonable grounds to believe that the charge states an offense triable by court-martial and that the accused committed it.[56] There is no requirement or need to formalize this requirement. Either the convening authority can determine that "reasonable grounds" exist or he can seek the advice of a judge advocate. Convening authorities should be instructed on the requirements of R.C.M. 601 and staff judge advocates should designate attorneys whom convening authorities can contact. In many cases, this will be the trial counsel who services the jurisdiction and the advice to the convening authority will be oral. The requirements of the rule will often be met by routine discussions between trial counsels and convening authorities. Of course, the convening authority is not obliged to refer all charges which the evidence might support.

The rule also eliminates the prohibition in the 1969 Manual against referring major and minor offenses to the same court-martial. Even if the charges are unrelated, they may now be tried jointly. Along with R.C.M. 307, which eliminates the requirement to try all known offenses, this rule gives greater flexibility in charging and trying multiple offenses.

Under the 1969 Manual, new charges could not be added after arraignment, even where all parties consented. R.C.M. 601(e)(2) now permits additional charges after arraignment if the accused expressly consents. This could work to the benefit of the accused. Under prior law, if the accused had been arraigned and additional offenses were either committed or discovered, the command's option was to try the accused a second time after completion of the first trial. Because the purpose of the old rule was to protect the accused from the addition of extra charges after a certain point, it simply makes sense to allow the accused to waive that protection and have all offenses tried at one trial, rather than facing the possibility of a second trial.

R.C.M. 601 also adopts the holding of *United States v. Blaylock*[57] that a superior authority is not preempted by the referral decision of a subordinate convening authority. The superior convening authority can essentially overrule the subordinate and direct that the case be transmitted to the higher command. The command may not, however, send the case to a higher level arbitrarily or unfairly to the accused. It would also be improper to order the subordinate convening authority to personally refer the case to a higher level court.[58]

H. Changes to Charges and Specifications

Pleadings are amended in the military, somewhere in the world, virtually every day. R.C.M. 603 does not change that. The same amendments will still be made by the same persons at the same points in the proceedings.

The 1984 Manual will alter only the terminology in this area. We now have "major" and "minor" changes to the charges and specifications. A major change is one which:

(1) Adds a party, offense, or substantial matter not fairly included in the specification; or

(2) Is likely to mislead the accused as to the offenses charged.

All other amendments will be minor changes.

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[56] R.C.M. 601(d)(1).

[57] 15 M.J. 190 (C.M.A. 1983).

[58] *See also* R.C.M. 104 (Unlawful command influence).

Minor changes to the pleadings may be made before arraignment by any of the persons who forward, act upon, and prosecute the charges, except the Article 32 investigating officer. After the arraignment, minor changes may be permitted by the military judge if no substantial right of the accused is prejudiced.

If a major change is necessary after arraignment, the trial may not proceed on the amended specification over the objection of the accused. If such a major change is necessary and the accused objects, the charges must be preferred anew. If the substance of the charge has changed, a new Article 32 investigation, referral, and service are also required.

IV. Pretrial Matters

A. Discovery

R.C.M. 701 codifies the military's liberal procedural for defense discovery and, for the first time in military practice, requires the defense to make some disclosures to the trial counsel before trial. R.C.M. 701 is intended to promote full discovery to the extent consistent with legitimate needs for nondisclosure (such as privileged matter and attorney work product) and to eliminate gamesmanship from the pretrial disclosure process.[59] The rule is based on Federal Rules of Criminal Procedure 12.1, 12.2, and 16, but provides broader discovery than current federal practice. The rule codifies the existing sources of military discovery practice; for instance, R.C.M. 701(a)(6) restates the disclosures which are ethically required under Disciplinary Rule 7-103(B). The rule also sets forth specific time limits for the making of disclosures and provides that certain disclosures need be made only after a request from the other party.

Under R.C.M. 701(a)(1), the trial counsel must disclose to the defense, as soon as practicable after service of charges, any paper which accompanied the charges when referred, the convening order, and any sworn or signed statement relating to an offense charged which is in the possession of the trial counsel. Prior to arraignment, the trial counsel must notify the defense of any prior civilian or court-martial convictions of the accused which the trial counsel may offer on the merits for any purpose, including impeachment if the accused testifies. Prior to trial on the merits, the trial counsel must notify the defense counsel of the names and addresses of the witnesses the trial counsel intends to call in the prosecution case-in-chief. The change in this area is that R.C.M. 701 provides specific time limits by which disclosure must be made. Nothing in the rule is designed to discourage earlier disclosure, where that is possible.

Certain other disclosures are required only after a defense request for such information. The Analysis indicates that "where a request is necessary, it is required to trigger the duty to disclose and as a means of specifying what must be produced."[60] Among the provisions which require a defense request is R.C.M. 701(a)(5) which requires the trial counsel, after a defense request, to allow the defense to inspect written material that will be presented by the prosecution at the presentencing proceedings and to notify the defense of the names and addresses of the witnesses the trial counsel intends to call at the presentencing proceedings.

Although the trial counsel is required to furnish the defense a list of witnesses in the case-in-chief and, upon defense request, a list of presentencing witnesses, the trial counsel is not generally required to disclose any information concerning potential rebuttal witnesses. The only exception to this rule is that the trial must disclose names and addresses of witnesses who will be called to rebut defenses of alibi or lack mental responsibility, if the defense has given proper notice concerning their defense.[61]

An area of some change in military discovery practice is contained in R.C.M. 701(a)(2)(A) and (B) which provide:

> After service of charges, upon request of the defense, the government shall permit the defense to inspect:
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> A. Any books, papers, documents, photographs, tangible objects, buildings or

[59] R.C.M. 701 (Introduction to Analysis).

[60] *Id.*

[61] R.C.M. 701(a)(3)(B).

places, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and

B. Any results or reports of physical or mental examinations and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known, or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense or are tended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

This provision is based upon Federal Rule of Criminal Procedure 16(1)(A) and (B). It should be noted the standard for production between the two subdivisions varies somewhat.

The disclosure requirement under subsection (A) is broader than the disclosure required under Military Rule of Evidence (M.R.E.) 311(d)(1). Under M.R.E. 311(d)(1), the trial counsel need only disclosure items believed owned by the accused which the trial counsel intends to offer at trial against the accused. Under subsection (A) of the R.C.M., the trial counsel would be obligated to disclose if the items belonging to the accused were "material to the preparation of the defense." Subsection (B) makes it clear that the trial counsel will be responsible for disclosing the results of physical and mental examinations and scientific tests of which he or she knows or should reasonably know through due diligence. Defense counsel may make a request for disclosure under either or both subsections of the rule and the trial counsel must respond to the request.

If the defense counsel request items under either of the subsections, trial counsel can request the same type of information from the defense upon compliance with the request.[62] For the first time, the government will be permitted limited reciprocal discovery. The right of the trial counsel to disclosure of this type information is premised upon compliance with a defense request under R.C.M. 701(a)(2). If the trial counsel discloses such information before a defense request is made under the rule, he or she will have no right to reciprocal discovery under the rule. Unlike federal practice under Federal Rule of Criminal Procedure 16, upon which these rules are based, the two subdivisions are separate for purposes of reciprocal discovery by the trial counsel.[63] For instance, if the defense makes a discovery request only under R.C.M. 701(a)(2)(A), the trial counsel can make a reciprocal request only under R.C.M. 701(b)(3) and would not be entitled to discover the results of any examinations or tests which the defense might possess under R.C.M. 701(b)(4).

In addition to this possibility of reciprocal discovery, R.C.M. 701(b)(1) requires the defense to give notice of the intent to rely on an alibi defense at trial. Such notice must be provided to the trial counsel before the beginning of trial on the merits. The notice must contain the specific place at which the accused claims to have been at the time of the offense and the names and addresses of the alibi witnesses.

R.C.M. 701(b)(2) requires the defense to notify the trial counsel of its intent to rely upon the defense of lack of mental responsibility, or if the defense intends to present expert testimony relating to a mental disease, defect, or other condition which bears upon the guilt of the accused. Notice must given if expert testimony concerns a "mental condition" bearing on the issue of guilt. The rule further requires notice of the defense of lack of mental responsibility even if the defense will be raised by lay testimony. The time for disclosure is before the beginning of trial on the merits.

The purpose of the rule requiring disclosure of alibi and mental responsibility defenses is to prevent "trial by ambush"—that is, to prevent surprise, to allow the government time to pre-

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[62]R.C.M. 701(b)(3) and (4).

[63]Federal Rule of Criminal Procedure 16b(1)(A) and (B) provide that a defense request under either provision entitles the prosecutor to reciprocal discovery of *both* types of information.

pare for those very specific defenses, and to prevent delay. A problem may arise, however, that undercuts the purposes of the rule. Because the defense can withhold disclosure until the beginning of trial on the merits. the government may still be surprised at a time when their trial strategy has been planned and may have to request a continuance to gather evidence to rebut the defense.

R.C.M. 701(g) gives the military judge specific authority to regulate discovery and subsection (3) of the rule lists sanctions that the judge can impose for failure to comply with discovery rules. The sanctions include prohibiting a party from introducing evidence or raising a defense not disclosed, but the rule also provides that the sanctions cannot limit the accused's right to testify on his or her own behalf. That means that the failure to make timely disclosure of an alibi defense may prevent the defense counsel from presenting alibi witnesses, if the judge orders that sanction, but the accused can still testify that he or she was somewhere else when the crime occurred.

B. Immunity

R.C.M. 704 concerns immunity and codifies much of what is practiced now. It lists both types of immunity—testimonial and transactional—and specifically authorizes the granting of testimonial immunity. Although case law and actual practice have recognized testimonial immunity, the 1969 Manual did not mention it. R.C.M. 704 also recognizes that testimonial or "use" immunity is preferred because it does not bar later prosecution, although the government has a heavy burden to show legitimate, independent evidence not derived in any manner from the testimony.

Witnesses who are granted transactional immunity get full immunity from trial by *court-martial.* Witnesses with testimonial immunity are protected from use and derivative use of the testimony in courts-martial, state prosecutions, and federal prosecutions (if the convening authority has gone through the proper procedures to get authority from the Department of Justice for witnesses subject to federal prosecution).[64] Neither type of immunity bars later trial for perjury or failing to comply with the order to testify.

R.C.M. 704(c) states that only the general court-martial convening authority has the power to immunize. This is true no matter what the level of court. The authority cannot be delegated to the staff judge advocate or to subordinate commanders, although the rule recognizes the *Cooke v. Orser*[65] situation where a person with apparent authority who purports to speak for the general court-martial convening authority may actually bind the convening authority.

The convening authority may grant immunity to persons subject to the UCMJ. For persons not subject to the UCMJ, the convening authority must get specific authorization from the Department of Justice to confer immunity for testimony given at a court-martial. In this situation, the convening authority does not actually *grant* the immunity, but acts more or less as the agent of the Department of Justice.

The major change in immunity is found in R.C.M. 704(e), the decision to grant immunity. The rule states that the decision whether or not to grant immunity is within the sole discretion of the convening authority. The change, however, is what happens when the defense requests immunity for a witness and the convening authority denies the request. The Court of Military Appeals attempted to set standards for defense requests for immunity in *United States v. Villines,*[66] but the three judges could not agree. This is a growing area of litigation in the federal courts and no clear position has emerged. R.C.M. 704(e) contains a liberal standard for aiding the defense, but imposes a high initial threshold. The rule states that, if a defense request for immunity is denied by the convening authority, the defense may raise the

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[64]The procedures are detailed in AR 27-10, chapter 2 (Proposed Revision).

[65]12 M.J. 335 (C.M.A. 1982). The SJA of the Strategic Air Command gave assurances to LT Cooke that he would not be prosecuted if he detailed his involvement in giving missive secrets to the Russians. The convening authority's later actions seemed to ratify this "immunity."

[66]13 M.J. 46 (C.M.A. 1982).

issue with the military judge. The judge does not have the power to overrule the convening authority and grant immunity, but the judge may order that the proceedings be abated until the immunity is granted. That would permit the government time to decide whether they wanted to prosecute the witness or the accused more. To get this ruling from the military judge, the defense has to show that:

(1) The witness will properly invoke the right against self-incrimination; and

(2) The testimony is of such central importance to the defense case that it is essential to a fair trial.

The defense counsel will face practical difficulties in meeting this standard. How will the defense counsel be able to know exactly what this witness will say if immunized? In addition, this is a high standard to meet—much higher than simply a "relevant and necessary" criterion. The witness has to have *essential* testimony central to a fair trial—the government should argue that this means the trial would have to be a mockery of justice if this witness does not get immunity, something the defense would have difficulty showing. While this is high standard, it also takes something away from the government. One of the standards from federal case law that *Villines* adopted was that the judge should not step in if there were strong governmental interests against granting immunity. The government's side of the equation is canceled by the rule—the judge looks to the necessity of the testimony to the defense case and a fair trial for this accused, without considering the effect on the government's other pending cases or overall trial strategy.

Until the courts decide what the rule means, it is likely that there will be many more requests for defense immunity and several are likely to be granted, particularly in cases with multiple defendants. If the judge orders the government to "immunize or abate" and the government decides to proceed, they should take specific protective steps. Although it is difficult to prosecute after granting testimonial immunity and the Court of Military Appeals has warned that subsequent prosecution should only take place in "exceptional cases,"[67] this is where the government may want to take the steps necessary to prosecute after testimony by sealing all evidence against the witness before the testimony and putting a different prosecutor on the case, to show that all evidence is independent and not derived in any way from prior testimony.

C. Pretrial Agreements

The 1984 Manual contains specific authority in R.C.M. 705 for an accused and the convening authority to enter into a pretrial agreement (subject to any limitations imposed by the Secretary concerned).[68] R.C.M. 705 actually makes no drastic change to the military plea bargaining process. It does, however, provide a basic framework for military pretrial agreements.

R.C.M. 705(b) outlines the thrust of plea bargains in the military. The accused may either agree to plead guilty or enter into a confessional stipulation of fact. In return, the convening authority may agree to do any one or more of the following: (1) refer a case to a certain level of court-martial; (2) refer a capital offense as noncapital; (3) withdraw certain charges or specifications from trial; (4) present no evidence on certain offenses; or (5) take specified action on the adjudged sentence. This list is not exhaustive.

The only novel aspect of R.C.M. 705(b) is the provision which permits a negotiated confessional stipulation of fact. Pursuant to such an agreement, the accused would enter a plea of not guilty, the merits would be contested on the basis of a stipulation alone, and the accused would get any relief promised by the convening authority. Through this procedure, an accused would not waive any pre-plea motions or legal issues otherwise waived by a provident plea of

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[67]*See, e.g.*, United States v. Whitehead, 5 M.J. 294 (C.M.A. 1978); United States v. Rivera, 1 M.J. 107 (C.M.A. 1975).

[68]Neither the 1969 Manual nor the UCMJ addresses plea bargaining. Nevertheless, pretrial agreements are commonplace, particularly in the Army and the Navy.

guilty.[69] The convening authority has the absolute discretion to accept or reject this offer, however, and there seems to be little advantage to the government in a confessional stipulation. If the defense motion loses at trial but wins on appeal, the government is faced with the situation of reconstructing the case, usually a considerable time later. The conditional guilty plea is likely to be accepted only in unusual cases.

R.C.M. 705(c) covers additional terms or conditions in pretrial agreements. While this subsection generally tracks the limitations imposed by current case law, the drafters envisioned that plea bargaining may be more flexible and creative than past practice.[70] Specifically, the rule provides that the accused must voluntarily agree to all terms of a pretrial agreement, and the government may not extract waivers of certain fundamental rights as part of the *quid pro quo* of the agreement.[71] The rule recognizes the fact that most plea bargains are the product of give and take negotiation between the parties and does not perpetuate the legal fiction that all provisions must be initiated by the accused. Once the accused initiates an offer to plead guilty, the convening authority, the staff judge advocate, or the trial counsel may suggest terms and conditions. The rule does, however, sanction certain other clauses or conditions which have been upheld by case law.[72] Noteworthy among these additional clauses is the authority for a post-trial misconduct clause.[73] The rule takes the position that if a post-trial misconduct clause specifies the type of misconduct that will trigger the clause and provides procedural protections similar to those given to revoke a suspended sentence, then the clause is valid.[74] The rule also provides that the accused can promise to provide restitution, promise to testify at other trials, and promise to waive procedural requirements, including the Article 32 investigation or the right to a trial with members. The accused is permitted to offer any or all of these conditions as an inducement to the convening authority to accept the plea bargain.

R.C.M. 705(d) sets forth the procedure for negotiating plea bargains and reducing the agreements to writing. These procedural rules make little change to present practice. Although the rule provides some flexibility with respect to who may negotiate on behalf of the government, only the convening authority may bind the government to any pretrial agreement. The decision whether to accept or reject a

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[69]While the negotiated confessional stipulation of fact has not been extensively used in practice, Chief Judge Everett recognized the usefulness of this device to preserve a legal issue in United States v. Schaffer, 12 M.J. 425, 428 n.6 (C.M.A. 1982).

[70]The Analysis to R.C.M. 705(c)(2) indicates that because the accused can waive many matters merely by failing or electing not to raise those matters, there is no reason why the accused may not elect to do so pursuant to a pretrial agreement. R.C.M. 705(c)(2) (Analysis). Thus, if a term is voluntarily agreed to by the accused and is not prohibited by R.C.M. 705(c)(1)(B), then it is possible that the accused could bargain with the condition. Government counsel should be careful, however, not to extract waivers of rights through coercive means.

[71]Specifically, R.C.M. 705(c)(1)(B) precludes the accused from bargaining away the right to due process, the right to counsel, the right to a speedy trial, the right to a complete sentencing proceeding, the right to effective exercise of post-trial and appellate rights, and the right to challenge the jurisdiction of the court.

[72]*See, e.g.*, United States v. Thomas, 6 M.J. 573 (A.C.M.R. 1978) and United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984) concerning stipulation of fact clauses; United States v. Reynolds, 2 M.J. 887 (A.C.M.R. 1976) and United States v. Tyson, 2 M.J. 583 (N.C.M.R. 1976) concerning provisions calling for the accused to testify against another; United States v. Callahan, 8 M.J. 804 (N.C.M.R. 1980) and United States v. Brown, 4 M.J. 654 (A.C.M.R. 1977) pertaining to restitution clauses; and United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982), United States v. Mills, 12 M.J. 1 (C.M.A. 1981), and United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975), on clauses waiving procedural requirements.

[73]R.C.M. 705(c)(2)(D) provides that an accused may "promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement." The requirement to conform the clause to R.C.M. 1109 (Vacation of suspension of sentence) insures that the accused will receive certain procedural rights before the convening authority can be released from the terms of the pretrial agreement.

[74]For specific guidance on the nature of a proper post-trial misconduct provision, *see* United States v. Dawson, 10 M.J. 142, 151 (C.M.A. 1981) (Everett, C.J., concurring in the result).

tendered pretrial agreement rests in the absolute discretion of the convening authority and is nonreviewable.[75] The accused must sign the offer and the convening authority may either accept or reject the agreement. If the convening authority accepts the deal, it must be signed either by the convening authority or by someone authorized to sign on the convening authority's behalf, such as the staff judge advocate. This part of the rule recognizes the "last minute deal," *i.e.*, submitted when the convening authority is accessible to approve the deal but not to physically sign it.

Withdrawal from a pretrial agreement is provided for in R.C.M. 705(d)(5). An accused is permitted to withdraw from a pretrial agreement at any time. The accused's ability to withdraw a guilty plea or an accepted confessional stipulation, however, is contigent upon other rules.[76] On the other hand, the convening authority may withdraw only before performance by the accused begins,[77] or when the accused fails to perform any material condition or promise, when there is a disagreement on a material term, or when the findings are set aside after trial because a plea entered pursuant to a pretrial agreement is held improvident.

Trial procedure and the requirement to inquire into the accused's understanding of the terms and conditions of a pretrial agreement are set forth in R.C.M. 910 (Pleas).[78] As part of that procedure, R.C.M. 705(e) prohibits informing the members of the existence of a pretrial agreement. This prohibition is in harmony with M.R.E. 410.

[75]*But see* Shepardson v. Roberts, 14 M.J. 354 (C.M.A. 1983), concerning the impact of the accused's detrimental reliance upon plea bargains.

[76]*See* R.C.M. 909(h) and R.C.M. 811(d).

[77]The beginning of performance by the accused is normally when the plea is entered, but may also include certain conduct undertaken before entry of the plea which is called for by other terms of agreement. *See* R.C.M. 705(d)(5) (Analysis).

[78]Included in the requirements of R.C.M. 910(f) is the requirement that the military judge conduct inquiry into the accused's understanding of the terms and conditions of the pretrial agreement. United States v. Green, 1 M.J. 453 (C.M.A. 1976).

D. Insanity

The 1984 Manual makes only a few procedural changes in the law regarding mental capacity and mental responsibility. R.C.M. 909 changes the government burden of proof in mental capacity issues from proof beyond a reasonable doubt[79] to proof by a preponderance of the evidence. R.C.M. 916(k)(3)(C) does away with a legal anachronism in providing that the issue of mental responsibility can no longer be litigated as an interlocutory motion.[80]

Finally, R.C.M. 701(b)(2) provides that before the beginning of trial on the merits, the defense must give notice of the intent to rely on the defense of mental responsibility, or the intent to introduce expert testimony relating to a mental disease, defect, or other mental condition bearing on the guilt of the accused. This provision does not alter the current scheme for releasing reports generated by compelled examinations.[81] It also does not require the defense to disclose the names of experts who will testify.

E. Speedy Trial

R.C.M. 707 (Speedy trial) is one of the most controversial changes in the 1984 Manual and has the potential to be a major self-inflicted wound. The rule creates a new standard: an accused shall be brought to trial within 120 days after notice of preferral of charges or the imposition of restraint, whichever is earlier. The 120-day rule applies to *all* trials, regardless of the level of court or the type restraint.

The drafters believe that allowing 120 days to get to trial is not an onerous standard, and that is probably true for most cases when the 120 days is from preferral to trial. The problems are likely to occur when the initial date is from "restraint" rather than from preferral. All types of restraint defined in R.C.M. 304, including "conditions on liberty," start the speedy trial clock.[82] That means that an accused who is ordered not to return to the bar where he

[79]MCM, 1969, para. 122*b*(3).

[80]MCM, 1969, para. 122*b*(4).

[81]R.C.M. 706; M.R.E. 302.

[82]*See supra* notes 13-22 and accompanying text.

assaulted someone has been "restrained" and must be tried within 120 days of that "condition on liberty." Commanders must be made aware of the rule and its impact, and must keep trial counsel informed of all restraint imposed.

One question not addressed is the effect of restraint imposed improperly. R.C.M. 304 states that any commissioned officer may impose restraint on any enlisted person. What happens when the first sergeant orders a soldier involved in a fracas at the EM Club to remain in the company area for an extended period? Will the government be able to argue that the first sergeant's restraint was not proper because he had no legal authority to restrict and thus the accused was never restrained for speedy trial purposes? Trial judges may not be sympathetic to that argument, particularly if the accused abided by the terms of the "restriction."

The 120-day period includes the day of trial but does not count the initial date of restraint or notice of preferral. The clock stops running when the accused enters a plea of guilty or evidence is presented on the merits. This is more restrictive on the government than case law: Judge Cook has said in several cases that Article 39a sessions terminate the speedy trial period.[83]

R.C.M. 707(b)(2) gives the government a possible escape valve for the situation where pretrial restraint starts the 120-day period. The rule says that if the accused is released from restraint for a significant period while no charges are pending, the accountable time will run only from the reinstitution of restraint or the preferral of charges. That means that an accused, restricted to his barracks for a weekend while the CID investigation is done, is released from the restriction for some "significant" time before charges are preferred, the 120 days starts from the charges, not from the weekend restriction. Obviously, the rule's language is general and leaves room for advocacy on both sides. How long does the accused have to be initially restricted before the government is precluded from taking advantage of this safety valve? How long does the government have to lift the restraint? The rule doesn't answer these questions, leaving resolution of particular situations and interpretation of the rule to the courts.

The rule contains an extensive list of exclusions. This is simple subtraction to get the government's accountable time under 120 days. The expanded list of exclusions is one of the trade-offs for imposing a numerical standard for all trials. Although the government must bring all accuseds to trial within 120 days, the exclusions allow the government considerable leeway in determining what days are accountable.

Periods of delay from other proceedings are excluded. These "other proceedings" include time for sanity boards, hearings on capacity to stand trial, pretrial motions sessions, government appeals under R.C.M. 908,[84] and petitions for extraordinary relief (including government writs). Delays caused by the unavailability of the military judge due to exceptional circumstances are excluded. This probably does not include a crowded docket—that time is still chargeable to the government. If the judge goes on emergency leave two days before trial is to begin, however, the government can probably exclude the time until the judge returns or a new judge can hear the case. Delays caused by, requested by, or *consented to* by the defense are also excluded from government accountability. Problems are likely to occur in interpreting whether the defense has consented to a delay or merely acknowledged a postponement in the trial date. If trial counsel calls the defense counsel on the 1st month and says that she would like to reschedule the case from the 5th to the 8th and the defense counsel responds "OK," has the defense counsel consented to the thirteen day delay? Counsel for both sides need to clarify what they mean in these situations: possibly the best way to avoid litigating the issue, if a speedy trial motion is likely, is to insure that all delays, and whether the defense consented, be put in writing and signed by both counsel.

Delays in the Article 32 investigation or continuances at trial *at the request of the government* may also be excluded from the speedy trial

[83] *See, e.g.*, United States v. Cabatic, 7 M.J. 438 (C.M.A 1979) (Cook, J., concurring in the result).

[84] *See infra* notes 90-91 and accompanying text.

clock. If the delay is requested because of unavailable evidence despite the government's due diligence, or to give the trial counsel additional preparation time because of the exceptional circumstances of the case, the government will not be accountable for the time. This means that if scientific evidence is unavailable because of a backlog at the lab, or the government has a complex case with witnesses coming from other parts of the world, it should be able to exclude preparation time and waiting time from the speedy trial period. This exclusion allows the government to delay the case and not be held accountable for the time.

R.C.M. 707(d) attempts to codify (and modify) the *Burton*[85] speedy trial rule for pretrial confinement. The Discussion to R.C.M. 707 recognizes that compliance with the rule might not mean compliance with *Burton*, which imposes stricter standards on the government in some circumstances. The Analysis to the rule invites the Court of Military Appeals to reexamine the *Burton* presumption. Basically, the drafters hope that the imposition of a specific rule in the Manual will supplant the *Burton* rules, but they recognize that those rules are court-created. It will take a case that complies with R.C.M. 707 but violates past law under *Burton* for the court to decide if this self-policing is adequate to alleviate the abuses that led them to create the *Burton* rules.

The accused who is in arrest or confinement is addressed in subsection (d). The rule provides that the military judge will order the accused released from confinement when the time exceeds ninety days, although the judge can extend the period for ten days "upon a showing of extraordinary circumstances." Virtually all the same exclusions apply to the computation of the ninety-day period that apply under the 120-day rule. Some of those exclusions clearly extend case law under the *Burton* rules. They include delays relating to capacity to stand trial, delays due to pretrial motions sessions, delays due to military judge availability, and any prosecution requested delays.

The structure of the new speedy trial rules may cause several hearings on one speedy trial motion when the accused is in pretrial confinement. When the time period reaches ninety-one days, the defense may request an Article 39a session at which the government would have to show extraordinary circumstances to extend the period for another ten days. On the 101st day, the defense could request another 39a session and force the government to litigate whether exclusions apply and to demonstrate that they have not exceeded accountable time. Then, if the case takes another twenty days to get to trial (presuming the accused has been ordered released), the defense could renew a speedy trial motion for violation of the 120-day rule, which applies to all accused, even those also protected by rules concerning arrest and confinement.

Speedy trial rules under the 1984 Manual attempt to set definite standards, but much will be left to trial court and appellate court interpretation. Unlimately, the Court of Military Appeals will have to decide whether to abandon more than a decade of case law in favor of the new Manual rule. Speedy trial will continue to be a technical area and one that is irritating to commanders, because the remedy for violation of these technical rules is dismissal of the charges, whatever the merits of the case.[86]

V. Trial Procedure

A. Conferences

R.C.M. 802 expressly authorizes the military judge to meet with the trial and defense counsel in out-of-court conferences. The accused need not be present but is not prohibited from attending. Defense counsel are likely to be confronted with a dilemma of whether to have the accused present. Many procedural issues can be easily handled at conference, but the presence of the accused (watching the trial counsel who is prosecuting him and the judge who may sentence him) may have a chilling effect on normal give and take. The accused might be even more suspicious, however, to see his defense counsel go into a meeting with the same two protagonists and emerge to assure him that "everything has been worked out."

[85]United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971).

[86]R.C.M. 707(e).

Neither party may be compelled to settle any matter at a conference. Indeed, a conference may not be conducted over the objection of any party. Any matters that are resolved at a conference, however, must be made a part of the record. If either defense counsel or the accused makes any admissions during the conference, they may not be used at trial unless reduced to writing and signed by the accused and defense counsel.

The format of conferences is not prescribed. A conference may be conducted by radio or telephone. Of course, improper *ex parte* communications are prohibited.

B. Motions

1. Motions practice generally

Motions practice under the 1984 Manual is covered in R.C.M.s 905, 906, and 907. R.C.M. 905 deals with motions generally, R.C.M. 906 with motions for appropriate relief, and R.C.M. 907 with motions to dismiss. R.C.M. 905(a) provides that motions may be made orally, but the military judge may in his or her discretion require written motions.

Motions practice under the new Manual remains basically the same, with several modifications. R.C.M. 905(b) sets out specific waiver provisions, listing motions that are waived if not entered before the entry of a plea. They include motions concerning defects in preferral, forwarding, investigation, and referral of charges; motions concerning defects in the charges; motions to suppress; motions concerning discovery and witness or evidence production; severance motions; and motions relating to requests for individual military counsel.

The burden of persuasion on any factual issue necessary to resolve a motion is normally on the moving party, by a preponderance of the evidence. For certain motions, the burden of persuasion is always on the prosecution. These include motions to dismiss for lack of jurisdiction, lack of speedy trial, or running of the statute of limitations.

R.C.M. 905(d) requires that motions made prior to entry of pleas should, unless the military judge determines good cause exists to defer ruling, be ruled upon before pleas are entered. The rule also provides that where factual matters are in dispute in determining a motion, the military judge must state essential findings on the record.[87] This procedure is not new to military practice; R.C.M. 905(d) expands the procedure used in suppression motions under Section III of the Military Rules of Evidence to all motions made before entry of plea.[88]

R.C.M. 906 sets out an inexhaustive list of grounds for appropriate relief. R.C.M. 907 sets out another inexhaustive list of the waivable, nonwaivable, and permissible grounds for a motion to dismiss.

2. Motion for a finding of not guilty

R.C.M. 917 now provides that a military judge may *sua sponte* raise a motion for a finding of not guilty. Procedurally, the motion will specifically state how the evidence is insufficient and the military judge must give each party an opportunity to be heard on the matter.

R.C.M. 917(e) now permits the granting of a partial finding of not guilty. Under R.C.M. 917(e) the military judge may grant the motion as to a charged offense and still allow a lesser included offense, as to which there is sufficient evidence, to be submitted to the finder of fact.[89]

Under R.C.M. 917(g), if all the evidence admitted before findings, including any defense offered evidence, is sufficient to sustain findings of guilty, the findings do *not* have to be set aside solely because the motion should have been granted at the time it was made.

C. Appeal by the United States

R.C.M. 908 and Article 62, UCMJ, allow the government to appeal rulings of the military judge which:

(1) Terminate the proceedings as to a charge or specification (*e.g.*, dismissal for lack of speedy trial); or

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[87]The rule is based on Federal Rule of Criminal Procedure 12e.

[88]*See* M.R.E.s 304(d)(4), 311(d)(4), and 321(f).

[89]*Compare* MCM, 1969, para. 71 *and* United States v. Spearman, 23 C.M.A. 31, 48 C.M.R. 405 (1974) for remedy where there is evidence only of a lesser included offense.

(2) Exclude substantial evidence of a material fact (*e.g.*, granting of a suppression motion).

The government may *not* appeal a ruling that is, or amounts to, a finding of not guilty. This interlocutory government appeal is made to the appropriate court of military review and is only available in a court martial in which a punitive discharge may be adjudged.

After an adverse ruling by the military judge, the trial counsel is entitled to a delay of up to seventy-two hours to decide whether to file notice of appeal. According to the proposed revision of Army Regulation 27-10, Military Justice, only the general court-martial convening authority or his or her staff judge advocate may decide to file this notice. If the government elects to appeal, written notice to this effect must be provided to the military judge within seventy-two hours after the adverse ruling or order. Once notice is given, the trial may not proceed except as to any charges and specifications not affected by the adverse ruling. A verbatim record is prepared and the record is authenticated.

The trial counsel is also responsible for promptly forwarding the appeal to the Chief, Government Appellate Division (GAD). After consultation with the Chief, Criminal Law Division, Office of The Judge Advocate General, the Chief of GAD will decide whether to file the appeal on behalf of the government. If the government elects to appeal, the case will, whenever practicable, have priority over all other proceedings before the Army Court of Military Review. If the Army Court of Military Review rules in favor of the government, the accused may petition the Court of Military Appeals for relief (The Judge Advocate may also certify a question to the Court of Military Appeals under this rule). The new Manual permits the court-martial to proceed as to the effected charges and specifications pending further review by the Court of Military unless the court orders the proceedings stayed.

If the Court of Military Appeals decides the case, either the accused or the government may appeal by writ of certiorari to the Supreme Court under R.C.M. 1205.

It is possible, then, for government appeals to be heard by three separate appellate courts. Even with expedited docketing at the appellate courts, the procedure could consume several months. This could raise an interesting speedy trial issue not resolved under the 1984 Manual. Although time for government appeals is excluded from accountability under the 120-day rule,[90] an accused in pretrial confinement must be released after ninety days (although this appeal time is potentially excludable, also). If the Court of Military Appeals decides to adopt R.C.M. 707 as the military speedy trial standard and abandon *Burton*, an accused could spend months or even years in pretrial confinement if a government appeal stays the proceedings and the appeal works its way to the Supreme Court.

Given this new capability to "overrule" the military judge, the initial tendency may be to appeal virtually all adverse rulings, particularly in cases with intense local command interest. Staff judge advocates must control this process at their level. An added level of control is mandated by AR 27-10's use of GAD as a channel for government appeals. Although the appeal is a welcome and useful tool in some circumstances, the controls are necessary to insure that appeal by the government is not abused.

D. Pleas

R.C.M. 910 (Pleas) retains many of the characteristics of paragraph 70 of the 1969 Manual. For example, the same types of pleas are recognized,[91] inquiries into the provisions of guilty pleas are still required,[92] and the military judge must enter a plea of not guilty when faced with any irregular plea.[93] The 1984 Manual, however, does make some changes to plea practice.

The first significant modification is the recognition of a new type of plea, the conditional guilty plea. R.C.M. 910(a)(2) permits an accused to enter a plea of guilty and preserve for appeal

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[90] *See supra* notes 82-84 and accompanying text.

[91] *See* MCM, 1969, paras. 66*a*, 70*a*.

[92] *See* United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969); MCM, 1969, para. 70*b*.

[93] *See* MCM, 1969, para. 70*a*.

any specified, pre-plea motions which would otherwise have been waived by a provident plea of guilty. Past practice mandated that such pleas be deemed improvident and any attempt to predicate a plea on such an understanding was rejected.[94] The new provision aligns military practice with a change to the Federal Rules of Criminal Procedure.[85]

There is, however, a significant limitation to the use of conditional pleas. Such pleas require the consent of both the government and the military judge. Pursuant to authority granted by the Rules for Courts-Martial, the Secretary of the Army will provide that the general court-martial convening authority may accept conditional guilty pleas on behalf of the government.[96] This seems to indicate that such pleas will be limited to general and bad conduct discharge special courts-martial. Furthermore, the government is unlikely to find many instances in which it consents to a conditional plea. The practical effect may be limited because there often seems to be little or no advantage to the government in consenting to this type plea.

The requirement for an oath during the providence inquiry is the next major change. R.C.M. 910(e) indicates that the accused's rendition of the facts in support of a guilty plea will be under oath. As part of his or her responsibilities, R.C.M. 910(c)(5) requires the military judge to inform the accused that prosecution for perjury or false statement may result should the accused lie under oath.[97] The source of authority for this advice is M.R.E. 410, which generally prohibits any use of statements made during the course of a providence inquiry. If the statement is made under oath, on the record, and in the presence of counsel, however, it may be offered at a subsequent trial for perjury or false statement.

One issue raised by the requirement for an oath is the effect of failing or refusing to take the oath. The rule is silent in this regard. Nevertheless, because the rule is written in mandatory rather than permissive language,[98] it would appear that refusal to take the oath constitutes grounds for rejection of the tendered guilty plea. Additionally, an issue is raised as to the effect of failing to advise the accused as required by R.C.M. 910(c)(5). Federal cases hold that failure to warn about the possibility of prosecution is not a matter going to the voluntariness of the plea nor does such a failure cause the accused to suffer any prejudice.[99] So long as otherwise proper advice was given and the factual basis for the plea appears on the record, the absence of the advice as to the oath should not render the plea improvident. The accused may be able to raise the absence of advice as a bar to subsequent prosecution for perjury or false statement, however.[100]

The rule also addresses the situation where an accused cannot remember the facts which form the basis for the offenses. Case law provides than an accused may still plead guilty,[101] and the rule codifies that case law. The Discussion following R.C.M. 910(e) provides that an accused need not recount the facts from personal recollection. If the accused has examined the evidence against him or her, is convinced of his or her guilt, and can state the factual basis for the plea on the record, the guilty plea may be accepted. This scenario occurs most frequently when the accused was so intoxicated that he cannot remember what happened.

R.C.M. 910(f) codifies the requirement that the military judge inquire into the accused's understanding of the terms and conditions of any pretrial agreement. This requirement has been imposed by case law for some time.[102] The

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[94] *See, e.g.*, United States v. Mallett, 14 M.J. 631 (A.C.M.R. 1982).

[95] Federal Rule of Criminal Procedure 11(a)(2).

[96] AR 27-10, para. 5-23*b* (Proposed Revision).

[97] Appendix 8, Trial Guide for Special and General Courts-Martial, does *not* include an instruction to the accused concerning the effect of the oath on subsequent prosecution. Trial judges will have to fashion their own, unless the Trial Judiciary intervenes.

[98] R.C.M. 910(e): "The accused *shall* be questioned under oath about the offenses." (emphasis added).

[99] *See* United States v. Conrad, 598 F.2d 506 (9th Cir. 1979).

[100] *Id.*

[101] United States v. Moglia, 3 M.J. 216 (C.M.A. 1977); United States v. Luebs, 20 C.M.A. 475, 43 C.M.R. 315 (1971).

[102] United States v. Green, 1 M.J. 453 (C.M.A. 1976).

Analysis to R.C.M. 910(f) makes it clear that defects in the pretrial agreement inquiry do not automatically render the plea improvident.[103] R.C.M. 910(h)(3) also deals with the pretrial agreement inquiry. In a trial by judge alone, the quantum portion of the agreement is examined after the sentence is announced. If it is them discovered that the accused does not understand any material term or if there is any disagreement on such a term, the military judge may do one of two things: (1) with the consent of the government, the judge may conform the agreement to the accused's understanding; or (2) the judge may permit the accused to withdraw the plea.

Finally, R.C.M. 910(j) tries to simplify the effect of guilty pleas as far as what is waived. The rule simply states that if an issue or motion relates to guilt or innocence, a provident plea of guilty to that offense waives the issue, whether raised or not. R.C.M. 910(j) is more limited than the waiver rule in paragraph 70*a* of the 1969 Manual which depended on the nature of the motion and whether or not it was raised before the plea was entered.[104]

E. Voir Dire and Challenges

R.C.M. 912 specifically authorizes challenges to the process of selecting court members and provides for discovery concerning the selection process. In general, pretrial questionnaires to members are authorized, the military judge controls the manner in which voir dire is conducted, and grounds for challenges for cause are set out in the rule, as well as provisions concerning waiver of challenges.

R.C.M. 912(a)(1) states that the trial counsel may submit a questionnaire to potential members seeking certain specified information.[105] At the request of defense counsel, such a questionnaire must be used. The purpose of the questionnaire is to expedite, but not replace, the voir dire process.[106] A list of questions is provided but additional questions may be presented if approved by the military judge. Questionnaires used at trial must be attached to the record.

The method of selection of court members is, like almost everything else in the military justice system, subject to discovery. R.C.M. 912(a)(2) provides that upon request of any party, any written materials considered by the convening authority in selecting the members, except materials pertaining solely to persons who were not selected as members, must be given to the requesting party. R.C.M. 912(a)(2) provides that if the material relates only to persons who were not selected as members, the material need not be disclosed unless the military judge, for good cause, directs its disclosure. This provision provides a means for determining if there is a basis for challenging the selection process. While the rule maintains the current practice of requiring challenges to be made and ruled on singly, R.C.M. 912(b) authorizes a challenge to the whole panel through a challenge to the selection process. The procedure calls for a motion to stay any proceedings requiring the presence of members until the convening authority reselects members.

R.C.M. 912(d) provides that the military judge may permit the parties to conduct the voir dire examination, or he may personally conduct

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[103]R.C.M. 910(f) (Analysis).

[104]MCM, 1969, para. 30*a*.

[105]The information requested from members includes:
(A) date of birth;
(B) sex;
(C) race;
(D) martial status and sex, age, and number of dependents;
(E) home of record;
(F) civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received;
(G) current unit to which assigned;
(H) past duty assignments;
(I) awards and decorations received;
(J) date of rank; and
(K) whether the member has acted as accuser, counsel, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.
Additional information may be requested with the approval of the military judge. Each member's responses to the questions shall be written and signed by the member.

[106]R.C.M. 912(a) (Analysis).

the examination of the members. The rule recognizes the decision of the Court of Military Appeals in *United States v. Slubowski.*[107]

There is no change in the number of peremptory challenges allowed in military practice, but there is a codification of the use of a peremptory challenge after denial of a challenge for cause. R.C.M. 912(f)(4) sets forth the situations in which exercise of a peremptory challenge may waive consideration of the denial of a challenge for cause on appeal.[108] The rule addresses the issues of preserving the denial of challenge on appeal and recognizes the dilemma of the defense when allowed but one peremptory challenge. The codification should eliminate some of the confusion in the area after the Court of Military Appeals decision in *United States v. Harris.*[109]

F. Production of Witness Statements (Jencks Act)

R.C.M. 914 includes a codification of the Jencks Act,[110] and for the first time in military practice provides for so-called "reverse Jencks" disclosure.[111] After a witness, other than the accused, has testified on direct examination, the judge can order production of any statement of the witness that relates to the subject matter of the testimony upon motion of the party who did not call the witness.

In the case of a government witness, a statement must be produced if it is in the possession of the United States.[112] In the case of a defense witness, the statement must be produced if it is in the possession of the defense counsel or the accused. The remedy under the rule is the striking of the witness' testimony. If the trial counsel fails to comply, a mistrial may be granted if required in the interests of justice. While R.C.M. 914 is not technically a rule of pretrial disclosure, nothing is intended to prevent counsel from disclosing such statements earlier than required by the rule.

R.C.M. 905(k) specifically provides that R.C.M. 914 applies at motions to suppress under Section III of the Military Rules of Evidence. The rule also provides that a law enforcement officer shall be deemed a witness called by the government.[113] That means that statements of witnesses, including CID or MPI agents, are disclosable after their testimony at a suppression hearing.

The net effect of the new provision may be to change the manner by which defense counsel attempt to lock-in a witness' story. Counsel are more likely to rely on personal notes and the presence of a lawyer's assistant or other third party at the interview as opposed to other methods such as recording the interview or having the witness sign either a statement or the interview notes. Personal notes of counsel would not be discoverable but the other listed methods of memorializing the statements could be subject to the "reverse Jencks Act."

VI. Sentencing

R.C.M.s 1001-1009 make some significant changes in the scope of aggravation evidence that can be presented by the trial counsel, eliminate some minor punishments from court-martial sentencing, and provide new procedures for imposing capital punishment.

The 1984 Manual continues the military tradition of providing information to the sentencing authority through an adversarial proceeding. In an attempt to eliminate gamesmanship and expand the scope of information available to the sentencing authority, the trial counsel is given greater opportunity to present evidence on aggravation, irrespective of the

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[107] 7 M.J. 461 (C.M.A. 1979).

[108] *Compare* United States v. Davenport, 14 M.J. 547 (A.C.M.R. 1982) *and* United States v. Dawdy, 17 M.J. 523 (A.F.C.M.R. 1983).

[109] 13 M.J. 288 (C.M.A. 1982).

[110] 18 U.S.C. § 3500 (1976).

[111] The rule is based on F.R.C.P. 26.2 which was not intended to change the requirements of the Jencks Act, except to expand it by providing for disclosure by the defense as well as the prosecution.

[112] *See* United States v. Ali, 12 M.J. 1018 (A.C.M.R. 1982); United States v. Bosier, 12 M.J. 1010 (A.C.M.R. 1982).

[113] R.C.M. 905(k) is based upon Federal Rule of Criminal Procedure 12(i).

type of plea entered in the case,[114] and regardless of what evidence the defense intends to introduce during extenuation and mitigation.[115]

First, R.C.M. 1001(b)(3) generally provides that prior convictions of the accused are admissible on sentencing despite the age or finality of the conviction.[116] This does away with the old six-year rule.[117] It also eliminates a considerable source of litigation relating to documentary proof of finality.[118] If an appeal is pending, the defense can present that fact as part of their sentencing case.

Second, R.C.M. 1001(b)(2) attempts to do away with the "rule of completeness" announced in *United States v. Morgan*,[119] where the Court of Military Appeals held that the trial counsel can be compelled (upon defense objection) to present pro-defense portions of the accused's personnel records if pro-government portions have been introduced in aggravation. The new rule provides that "if the accused objects to *a particular document* as...incomplete...the matter shall be determined by the military judge." It will be up to the courts to decide whether this limiting language will successfully do away with the rule of completeness currently being applied to personnel files as a whole.

Third, R.C.M. 1001(b)(4) (Discussion) suggests that evidence in aggravation may properly include victim impact evidence. The scope of aggravation evidence allowed by the rule itself includes "circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." Military appellate courts have sanctioned a broad right to present aggravation evidence.[120] Recently in *United States v. Pearson*,[121] the Court of Military Appeals held that aggravation evidence could properly include evidence concerning the homicide victim's character and evidence concerning the magnitude of loss felt by the victim's family and community. The drafters of R.C.M. 1001(b)(4) suggest that it is proper to include evidence of the "financial, social, psychological, and medical" impact of the offense upon the victim. They also make it clear that a "victim" can be an entity, such as a military unit, which may have suffered an adverse impact on discipline, efficiency, or readiness due to the accused's misconduct. While victim impact evidence may be the wave of the future for military courts, it remains to be seen how the courts will weigh competing interests such as the prejudicial effect of uncharged misconduct, the invasion of the province of the jury, and arguments which are designed only to inflame the passions of the members. At a minimum, trial judges will be faced with balancing probative value against prejudicial effect under M.R.E. 403. Until limitations are developed by case law, victim impact evidence provides a fertile area of good aggravation evidence for the aggressive and innovative trial counsel.

The sentencing provision which will probably have the greatest impact on court-martial practice is R.C.M. 1001(b)(5). This rule allows the trial counsel to present—as part of the case in aggravation—opinion evidence concerning the accused's duty performance and potential for rehabilitation. Under the 1969 Manual, evidence concerning the accused's duty performance or rehabilitative potential was presented to the sentencing authority only if the defense "opened the door" during extenuation and mitigation.

R.C.M. 1001(b)(5) allows the defense to inquire into specific incidents of conduct on cross-examination, but the rule is silent regarding the extent to which the trial counsel can then

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[114]R.C.M. 1001(a)(1). This codifies the case of United States v. Vickers, 13 M.J. 403 (C.M.A. 1983).

[115]R.C.M. 1001(a)(1).

[116]The only exception is that summary court-martial convictions must have been reviewed under Article 65(c) UCMJ.

[117]MCM, 1969, para. 75*b*(3).

[118]*See, e.g.*, United States v. Brown, 11 M.J. 263 (C.M.A. 1981); United States v. Reed, 1 M.J. 166 (C.M.A. 1975); United States v. Lemieux, 13 M.J. 969 (A.C.M.R. 1982).

[119]15 M.J. 128 (C.M.A. 1983).

[120]*See, e.g.*, United States v. Marshall, 14 M.J. 157 (C.M.A. 1982); United States v. Vickers, 13 M.J. 403 (C.M.A. 1982); United States v. Fitzhugh, 14 M.J. 595 (A.F.C.M.R. 1982).

[121]17 M.J. 149 (C.M.A. 1984).

explore specific incidents of conduct on re-direct after the defense counsel "opens the door." The results will, however, probably be inequitable whichever way trial judges and appellate courts rule. If the trial counsel is prohibited from exploring specific incidents on redirect the defense counsel can use cross-examination to elicit a favorable, but incomplete, list of specific incidents of conduct, *e.g.*, passing the IG inspection, showing up at work on time. The sentencing authority would be left with an inaccurate picture of the accused's specific conduct and the witness would be unable to fully defend their opinion testimony.

On the other hand, if the accused has passed every military inspection, that information arguably should be explored without opening the door to an unlimited presentation of uncharged misconduct on re-direct. It will be up to the courts to fashion a test which promotes the rule's dual purposes of providing the sentencing authority with accurate information and eliminating gamesmanship.

R.C.M. 1003(b) contains the exclusive list of punishments authorized at courts-martial. Absent from the list are admonitions,[122] detentions of pay,[123] and extra duty.[124] The rule clearly states that any punishment not listed is not an authorized punishment.

The most important change concerning types of punishment imposed by courts-martial is R.C.M. 1004 which outlines new capital punishment procedures. On 11 October 1983, the Court of Military Appeals decided that the military death penalty procedures used to sentence PFC Wyatt Matthews to death were unconstitutional.[125] At the time the *Matthews* decision was handed down, the Joint Service Committee on Military Justice had already drafted revised death penalty provisions for inclusion in the 1984 Manual for Courts-Martial. Proposed R.C.M. 1004 was extracted from the new Manual and separately signed into effect by the President on 24 January 1984 as Executive order 12,460. These procedures, contained in the 1969 Manual as paragraph 74*g*, will be carried over to the 1984 Manual as R.C.M. 1004.

The new procedures are designed to specifically identify aggravating circumstances which justify the death penalty for an individual accused. R.C.M. 1004 contains a list of specific aggravating factors which may be relied on to impose the death penalty. Before arraignment the trial counsel must give the defense written notice of which aggravating circumstance(s) the prosecution intends to prove. After all the sentencing evidence is introduced, the military judge must instruct the court members on such aggravating circumstances as may be in issue and must instruct the members to consider all of the evidence presented in extenuation and mitigation. The death penalty can be imposed only if the court members unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed. They must further specifically find that any mitigating circumstances are substantially outweighed by the aggravating circumstances.

Although these provisions have not yet been reviewed by any appellate court, there is every reason to believe they will pass constitutional muster.[126]

VII. Post-Trial

A. Post-Trial Procedure

Both the substance and procedure of post-trial court-martial processing is changed under Chapter XI (Post-Trial Procedure) of Part II, Rules for Courts-Martial, in the 1984 Manual. Many of these changes are mandated by the Military Justice Act of 1983. Initially, practitioners must learn new jargon: staff judge advocate's post-trial recommendation, judge advocate's review, R.C.M. 1106(f) process, R.C.M. 1105 matters, and R.C.M. 1102 post-trial session, to name but a few. Most importantly, practitioners on both sides of the case and the convening authority must understand their new roles and responsibilities. A heavy

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[122]MCM, 1969, para. 126*f*.

[123]MCM, 1969, para. 126*h*.

[124]United States v. Pleasants, 46 C.M.R. 1294 (A.C.M.R. 1973).

[125]United States v. Matthews, 16 M.J. 354 (C.M.A. 1983).

[126]*See* R.C.M. 1004 (Analysis).

burden has been shifted from the staff judge advocate and convening authority to the accused's trial defense counsel. The *initial* duty to comb errors out of the trial process now lies with the defense. On the other hand, in some cases, a judge advocate's review at the installation level, after initial action by the convening authority, will be the final legal review before a punitive discharge is executed. While the changes are many, there remains much that is familiar. Advocates will be challenged to gain the maximum benefits for their clients; administrators will be tested in the processing of cases under unfamiliar procedural rules.

R.C.M. 1101 is principally of interest because of subsection (c) which details the deferment process. The rule lists a number of factors which the convening authority may consider. Among those factors are "the command's immediate need for the accused" and "the effect of deferment on good order and discipline in the command."[127] Defense counsel seeking to meet their burden of justifying the deferment of sentence would be wise to address these command concerns in a positive fashion. The rule expressly provides for judicial review of the deferment decision on an abuse of discretion standard. One other aspect of deferment is worth noting. If deferment continues after the convening authority's initial action but the deferment is then rescinded, the accused must be given notice and an opportunity to respond in writing to the rescission decision.[128] The accused is granted a seven-day period to respond before confinement may be ordered executed.

R.C.M. 1102 recognizes that the military judge's jurisdiction over a case continues until the record of trial is authenticated.[129] The rule authorizes the judge to inquire into and resolve "any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence."[130] This rule is available to the government to correct some trial deficiencies, but it is of greater significance to the defense as an additional opportunity to attack a conviction or sentence. One potential problem under this rule involves shipment of an accused to a distant place of confinement before a post-trial session is called by the military judge. Unless waived, the accused's presence is required at an Article 39(a), UCMJ, session. A second area of concern is that the procedures for requesting or assembling a post-trial session are not spelled out in the rule. Because not every request for an R.C.M. 1102 session by the defense will be granted, it is important for subsequent appellate review to support the request with extensive offers of proof and legal memoranda. A complete recital of the material facts and relevant law will also help the trial judge determine whether to call a post-trial session. Obviously, counsel who oppose the other party's request for a post-trial session should make an equally complete submission in support of its position.

R.C.M. 1103, governing the preparation of records of trial, contains one change of great interest to counsel. Subsection (i)(l)(B) authorizes examination of the record by the defense counsel before authentication, unless unreasonable delay is caused by this examination process. This process should give trial defense counsel an excellent opportunity to review the trial for issues that merit relief under R.C.M. 1102, and for matters to be submitted under R.C.M. 1105 which will be discussed below.

R.C.M. 1104 concerns authentication of records of trial. The rule requires authentication by the presiding military judge of each portion of the record; two or more judges' actions may be required to complete the authentication process. The rule also generally adopts the requirements of *United States v. Cruz-Rijos*[131] for substitute authentication and service of the record on the defense under Article 54, UCMJ.

R.C.M. 1105 is the new procedure for the accused. It is based on Article 60, UCMJ as amended by the Military Justice Act of 1983. It

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[127]R.C.M. 1101(c)(3).

[128]R.C.M. 1101(c)(7)(D).

[129]This is consistent with the current view of the Court of Military Appeals. *See, e.g.*, United States v. Brickey, 16 M.J. 258 (C.M.A. 1983).

[130]R.C.M. 1102(b)(2).

[131]1 M.J. 429 (C.M.A. 1976).

authorizes the accused to submit written matters after sentencing for the convening authority's consideration before acting on the case and is separate and distinct from the right to submit matters under Article 38(c), UCMJ. The accused's submissions under R.C.M. 1105 must be made within specified time limits. Subsection (c) sets those periods for each type of case.[132] Subsection (d) describes the waiver rules and trial defense counsel should become familiar with these rules to avoid inadvertant waivers.

When the accused's R.C.M. 1105 submissions contain allegations of legal errors, the staff judge advocate must respond to those allegations. The response may be a simple statement of disagreement, so it may be of little immediate benefit to file extensive legal memoranda under R.C.M. 1105 alleging novel theories of legal error. These submissions must be considered by the convening authority. The trial defense counsel should look for the equitable, human side of the case to generate command consideration in favor of clemency. Family circumstances, prior good service, and other service members' recommendations are the types of material contemplated under this aspect of R.C.M. 1105. The submissions are not limited by the record of trial or the rules of evidence. This is, in effect, an opportunity to make a second sentencing argument and to include things counsel could not or did not use at trial. Never before have defense counsel's persuasive *writing* skills been so important to the accused.

One of the fundamental reforms of the Military Justice Act of 1983 is to reduce, as much as possible, the burden of legal review on the nonlawyer commander/convening authority. To accomplish this, the post-trial review process was drastically altered. As noted above, R.C.M. 1105 shifts the initial burden of finding and alleging legal errors to the defense. R.C.M. 1106, which implements the amended Article 60, UCMJ, provides for a staff judge advocate's post-trial recommendation in general courts-martial and in special courts-martial which adjudged a bad-conduct discharge. This recommendation is not required to be a legal review. It is intended to be a concise written document that will assist the convening authority in the exercise of command prerogative in taking action on the sentence. Unlike past practice under paragraph 85*b* of the 1969 Manual, the new rule does not require the short-form review concerning jurisdiction where the proceedings terminated without a finding of guilty.

Under R.C.M. 1106 the post-trial recommendation must include:

(1) The adjudged findings and sentence;

(2) A summary of the accused's service record;

(3) A description of any pretrial restraint;

(4) A statement concerning the effect of any pretrial agreement; and

(5) A specific recommendation concerning the convening authority's action in the case. The recommendation must also state the staff judge advocate's opinion concerning the need for corrective relief as to the legal errors raised in the defense submissions under R.C.M. 1105. This opinion need not be supported by any analysis or rationale. The rule also authorizes the inclusion of any other appropriate matters, even from outside the record. An example illustrating how this recommendation might be prepared is contained at Appendix B.

R.C.M. 1106(f) requires service of the staff judge advocate's post-trial recommendation on the accused's counsel just as such service was mandated by *United States v. Goode*[133] and *United States v. Narine*[134] for post-trial reviews. The defense has five days to respond and failure to respond waives objections to any errors in the recommendation other than plain error. If, on appellate review, unwaived errors are discovered in the post-trial recommendation, the case will *not* be returned to the convening authority for a new recommendation and

[132]The time period for general courts-martial and special courts-martial with an adjuged bad-conduct discharge is the later of thirty days after sentence is announced or seven days after service of the authenticated record on the defense.

[133]1 M.J. 3 (C.M.A. 1975).

action. The appropriate corrective relief will be applied by the appellate authorities.

R.C.M. 1107 governs the convening authority's initial action. The rule requires consideration of the results of trial, the staff judge advocate's post-trial recommendation, as well as the matters submitted by the defense under R.C.M. 1105 and in response to the R.C.M. 1106 recommendation. The convening authority may consider any other appropriate matters before acting on a case but does not have to review the record for either legal correctness or factual sufficiency. One significant change has been made in the action process. Under R.C.M. 1107, the convening authority may order any part of the sentence approved executed in the initial action, except death, dismissal, or a punitive discharge. One minor change worth noting is that, as implemented in the proposed revision of AR 27-10, the convening authority will no longer designate a place of confinement in the action.

R.C.M.s 1108 and 1109 deal with suspension of sentences and vacation of suspended sentences. The rules provide for new procedures to suspend and vacate, and a new form to report vacation of sentence proceedings.[135]

If an accused waives or withdraws from appellate review under Article 66, UCMJ, or the case does not qualify for such review, R.C.M. 1112 provides for legal review by a judge advocate. This review will normally be conducted at the installation. Each review must contain written conclusions about the court-martial's jurisdiction over the person and offenses, the legal sufficiency of the specifications, and the legality of the sentence. In addition, the reviewing judge advocate must respond to written allegations of error filed by the defense under R.C.M.s 1105, 1106(f), or any filed directly with the reviewing officer. In many instances the completion of this R.C.M. 1112 review will be the final legal review. If, however, the reviewing judge advocate recommends corrective action or if the approved sentence includes dismissal, a punitive discharge, or confinement in excess of six months, the case must be sent to the officer exercising general court-martial jurisdiction for final action. That officer has plenary power over the case, but the reviewing judge advocate must include a recommendation as to the action which should be taken and an opinion concerning the legal requirement, if any, for corrective action. An example illustrating how this judge advocate's review might be prepared is contained at Appendix C. Ordinarily, the action taken will be final and may include ordering the execution of a punitive discharge. Dismissals must be reviewed by the service Secretary before execution. In some instances subsequent legal review will also be necessary. If the reviewing judge advocate recommends corrective relief and opines that it is required by law but the convening authority takes action less favorable to the accused, the case must be reviewed by The Judge Advocate General under R.C.M. 1201(b)(2).

R.C.M. 1113 addresses execution of sentences. As mentioned above, the convening authority now may order a sentence executed in the initial action, except for death, dismissal, or a punitive discharge. In ordering a punitive discharge executed after the final review, however, the convening authority must consider the advice of the staff judge advocate as to whether retention of the service member is in the best interests of the Army if more than six months have elapsed since the discharge was approved. The rule sets forth what must be included in this advice. It would appear that these matters could be included in the judge advocate's review under R.C.M. 1112 if the staff judge advocate is the reviewing officer.

R.C.M. 1114 describes promulgating orders and contains one significant change. The charges and specifications may be summarized instead of copied verbatim.

B. Waiver or Withdrawal of Appellate Review

After any general court-martial, except one in which the death penalty has been approved or any special court-martial in which the approved sentence includes a bad conduct discharge, an accused may elect to waive or withdraw from appellate review under R.C.M. 1110. Even if an

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[134]14 M.J. 55 (C.M.A. 1982).

[135]*See* MCM, 1984, Appendix 18.

accused waives appellate review under this rule, his or her case must still be reviewed by a judge advocate pursuant to R.C.M. 1112. The rule also makes it clear that the waiver or withdrawal of appellate review must not be compelled or coerced. The convening authority is thus precluded from promising that, if the accused waives appellate review, he or she will reduce the sentence when taking final action.

In making the decision to waive appellate review, an accused has the right to consult with legal counsel. Usually, this consultation will be with the civilian, individual military, or detailed counsel who represented the accused at trial. If that counsel is not immediately available, the new Manual provides authority to appoint an associate counsel to advise the accused. If trial defense counsel has been excused under R.C.M. 505(d)(2)(B), substitute counsel may be detailed.

If the appeal is already in appellate channels, the accused will be advised about withdrawal from appellate review by his or her appointed appellate defense counsel. The Manual also provides for an associate counsel and the detailing of counsel for the accused if no appellate defense counsel has been assigned.

An accused must submit a waiver of appellate review within ten days after he or his defense counsel is served with a copy of the convening authority's action. It must be in writing and attached to the record of trial. It must include statements that the accused and the defense counsel have discussed the accused's appellate rights, that they discussed the effect a waiver would have on these rights, that the accused understands these matters, and that the waiver is voluntarily submitted. Both counsel and the accused must then sign it (forms for this purpose are included in Appendices 19 and 20 of the 1984 Manual).

A withdrawal from appellate review may be filed with the authority exercising general court-martial jurisdiction over the accused, who will promptly forward it to The Judge Advocate General, or it may be filed directly with The Judge Advocate General. Such a request may be made at any time before review is complete.

The effect of a waiver or withdrawal will be to bar review by The Judge Advocate General under R.C.M. 1201(b)(1) and by the Army Court of Military Review. Once a waiver or withdrawal is submitted, it may not be revoked.

C. Action by The Judge Advocate General

R.C.M. 1201(b)(1) and Article 60(a), UCMJ expand the power of The Judge Advocate General when reviewing courts-martial. If any part of the findings or sentence is found to be unsupported in law, or if reassessment of the sentence is deemed appropriate, The Judge Advocate General may modify or set aside the findings or sentence or both. Previously, The Judge Advocate General did not consider sentence appropriateness because he had no authority to reassess the sentence. The Judge Advocate General may still direct that general courts-martial for which there is no appellate review in R.C.M. 1201(a) be reviewed by the Army Court of Military Review.

D. Review by the Supreme Court

Except for a possible collateral attack in the federal courts, review of a court-martial by the Court of Military Appeals has been an accused's final avenue of appeal. R.C.M. 1205 and Article 67(h)(1), UCMJ, make an important change in this regard. These rules permit both the accused and the government to petition the United States Supreme Court for review, by writ of certiorari, of cases reviewed by the Court of Military Appeals. Because the Court of Military Appeals does not actually review a case when it denies an accused's petition for review, such a denial could not reach the Supreme Court under this change. The only cases, then, in which the Supreme Court could grant certiorari are those the Court of Military Appeals has actually decided.

The percentage of petitions for certiorari generally granted by the Supreme Court is low. Whether and how often petitions will be granted in military cases is a matter of conjecture. On issues of "pure" evidentiary or constitutional law, *i.e.*, where there is no difference between the military and civilian rules, the Court might grant a petition if the military court's interpretation was contrary to established federal law. Until it is clear how the Court will

use this new power, trial defense counsel should consider raising constitutional issues in appropriate cases. For instance, defense counsel could raise issues of non-unanimous verdicts or less than six member juries. Military courts have decided these and similar issues, but the Supreme Court has never specifically addressed them in the military context. Recent decisions of the Court seem to indicate that the Justices are likely to recognize the need for a separate and distinct system of military justice and are unlikely to grant many petitions for certiorari.[136] It may be the rare military case that actually reaches the Supreme Court by this route, but it is one final avenue of appeal for the military accused.

The government may also petition for certiorari. The Solicitor General will exercise quality control over government petitions, as he does for other federal agencies. Only exceptional cases with far-reaching impact are likely to be candidates for government petitions.

E. Extraordinary Writs

The authority of the military appellate courts to grant extraordinary relief appears for the first time in the 1984 Manual. It is only addressed in the discussion, however. Under R.C.M. 1203(b), the discussion recognizes the extraordinary writ authority of the courts of military review. The discussion following R.C.M. 1204(a) addresses the writ authority of the Court of Military Appeals. It suggests that petitions for extraordinary relief should be filed initially at the appropriate service court of military review. Practitioners should be aware that in recent years the Court of Military Appeals has not required initial review of a petition for extraordinary relief by a court of military review as a matter of judicial economy or exhaustion of remedies. Furthermore, some cases require such prompt disposition as to compel filing in the court of last resort.[137] Of course, under R.C.M. 1205, if the Court of Military Appeals grants relief in a case, it is subject to review by a writ of certiorari to the Supreme Court.

R.C.M. 1202 implements Article 70, UCMJ by providing for appellate counsel to represent the parties before the military appellate courts or the United States Supreme Court. Where the government petitions for extraordinary relief and names the military judge as the respondent, the accused is deemed to be a party and entitled to representation by appellate defense counsel.

The last noteworthy extraordinary writ aspect of the new Manual involves the speedy trial rules of R.C.M. 707(a) and (d). Any period of delay occasioned by any petition for extraordinary relief filed by any party is excluded in computing whether the total period of delay violates the 120-day rule or the release from pretrial confinement provisions.

VIII. Summary Courts-Martial

Specific rules governing summary courts-martial are contained in Chapter XIII, Part II, R.C.M.s 1301-1306 of the 1984 Manual. The rules make minor changes to existing law and clarify some previously uncertain matters.

R.C.M. 1301 discusses summary courts-martial generally. It reiterates that there is no constitutional or statutory right to counsel for the accused, but it also states that if the accused has retained a civilian counsel, that attorney must be permitted to attend if it will not necessarily delay the proceedings. The proposed revision of AR 27-10 provides that, unless precluded by military exigencies, the summary court officer *will* allow the accused an opportunity to consult with qualified defense counsel before the trial date. The consultation is for advice on rights and options and the consequences of waiving rights by consenting to a summary court-martial. A summary court officer who denies an accused this consultation opportunity must fully document the reasons in a certificate attached to the record of trial.[138] Of course, if the accused has not been given the opportunity to consult with counsel, a summary court-martial conviction will not be admissible in aggravation.[139]

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[136] *See, e.g.*, Chappell v. Wallace, 103 S.Ct. 2362 (1983).

[137] *See* United States v. Berta, 9 M.J. 390 (C.M.A. 1980).

[138] AR 27-10, para. 5-21 (Proposed Revision).

[139] *See* United States v. Mack, 9 M.J. 300 (C.M.A. 1980).

R.C.M. 1302, concerning the convening of summary courts, states that a summary court-martial may be convened by a notation on the charge sheet. That eliminates the need for a separate convening order. Instead, the convening authority may simply note in Block 4 of the charge sheet, "Effective 1 September 1984, MAJ Hartpence is hereby detailed as Summary Court-Martial."

R.C.M. 1303 sets up a specific time by which the accused must have objected to summary court. The accused must object to the summary court-martial *prior to* arraignment.

R.C.M. 1304 covers trial procedure and is supplemented by Appendix 9 to the 1984 Manual, a summary court-martial trial guide. Summary court officers should use the new appendix until DA Pamphlet 27-7 is revised because it includes certain specific rights that the summary court-martial must advise the accused of that are not contained in the current DA Pamphlet.

The record of trial in summary courts was formerly the small portion on the fourth page of the charge sheet. R.C.M. 1305 describes the requirements for a new record of trial, and a sample format is at Appendix 15 of the 1984 Manual. The format includes a checklist for the summary court officer, to insure that the accused has been properly advised of all rights and procedures have been properly completed.

Along with the new record of trial comes a new review procedure, described in R.C.M. 1306. After the sentence is adjudged, the accused has the right to submit matters to the convening authority, who is precluded from taking action before the seven-day period in which to submit matters. This gives the accused a week to prepare and submit clemency matters or allegations of error to the convening authority. Review by a judge advocate is covered by R.C.M. 1112[140] and is much more limited than review under the 1969 Manual.

IX. Crimes and Defenses

The 1984 Manual contains many changes in crimes and defenses. This section will discuss changes in the Manual format, punishments, new and modified offenses, and defenses.

A. Format for Punitive Articles

The format change for the punitive articles is a welcome improvement. Part IV, the punitive articles section of the Manual, has fifty-nine paragraphs dealing with Articles 77-133 of the UCMJ and fifty-three paragraphs describing Article 134, UCMJ offenses. Each of the fifty-nine paragraphs dealing with the punitive articles includes the codal article, elements of the offense, explanation, commonly included offenses, maximum punishment, and form specifications. The fifty-three paragraphs describing Article 134 offenses use the same format except that the text of Article 134 is not repeated in each paragraph.

The format change and the expanded coverage of Article 134 offenses will make use of the Manual by commanders and infrequent users easier. With the 1969 Manual, one had to look in five places to find the information collected in each paragraph of Part IV. Further, the 1969 Manual only fully described fourteen common Article 134 offenses and the drug offenses. For a full explanation of the remaining common Article 134 offenses, access to the Military Judges' Benchbook[141] was required.

B. Punishments

The President's exercise of his Article 56, UCMJ authority to prescribe punishments for offenses resulted in several changes in the 1984 Manual. Some changes result simply from changing the punishment for an offense and some changes result from recognition of new or different aggravating factors which merit greater punishment.

Perhaps the most significant change in punishment for a specific offense will be the authorization of a bad-conduct discharge for assault consummated by a battery under Article 128. The drafters' rationale is that a battery may result in a serious injury even though it was not

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[140]*See supra* notes 127-135 and accompanying text.

[141]U.S. Dep't. of Army, Pamphlet No. 27-9, Military Judges' Benchbook (1982) [hereinafter cited as Military Judges' Benchbook].

an aggravated assault.[142] The change is important because of the frequency with which battery is either charged or is a lesser included offense.

Several noteworthy changes have been made regarding aggravating factors. The special dangers of firearms and explosives have been recognized in Article 108 offenses regarding military property and the Article 121 offenses of larceny and wrongful appropriation. In each article an offense involving a firearm or explosive merits the maximum punishment, *i.e.*, ten years confinement for Article 108; five years confinement for larceny, and two years confinement for wrongful appropriation. Use of a firearm in a robbery or aggravated assault authorizes an additional five years confinement. Thus robbery with a firearm is punishable by fifteen years confinement, aggravated assault using a firearm as a means likely to produce grievous bodily harm is punishable by eight years confinement, and intentionally inflicting grievous bodily harm with a firearm is punishable by ten years confinement.[143]

The 1969 Manual's three-tiered value system for punishments for certain property offenses has been replaced by a two-tiered system. The two tiers, $100 or less and over $100, apply to Article 103 (captured or abandoned property), Article 108 (military property), Article 109 (non-military property), Article 121 (larceny and wrongful appropriation), Article 123a (check offenses), Article 132(3) and (4) (frauds against the United States), and Article 134 (obtaining services under false pretenses, and receiving stolen property). These changes bring the punishments more in line with federal law and create the equivalent of a felony/misdemeanor distinction in military law.

Finally, adjustments in aggravating factors in AWOL offenses under Article 86 have been made. If an AWOL is over thirty days, a new aggravating factor of termination by apprehension will increase the maximum confinement from twelve to eighteen months. Also, going AWOL to avoid field exercises or maneuvers is an aggravating factor that now authorizes a bad-conduct discharge.

C. New and Modified Offenses

The only change in the Military Justice Act of 1983 regarding crimes created or modified drug offenses. The Act created a new codal provision, Article 112a, UCMJ which generally took the drug offenses that had been found under Article 134 in paragraph 213*g* of the 1969 Manual.[144] A separate article was created to show increased congressional concern over the dangers of drug abuse in the military.[145] The Act created the offenses of importing drugs in the customs territory of the United States and exporting drugs from the United States. The offenses brought over from Article 134, such as possession and distribution, were modified in the sense that the Article 134 element that the offense be prejudicial to good order and discipline or service discrediting need not be proved.[146]

Many other offenses are either created or modified, not by congressional action, but by presidential action in the 1984 Manual. These new and modified offenses must be viewed more circumspectly than those offense created or modified by legislation. It is important to note that the President's authority under Articles 36 and 56, UCMJ to prescribe rules of procedure and punishments does not include legislative

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[142]MCM, 1984, Part IV, para 54e (Analysis). There may not be an aggravated assault because intent to injure seriously was lacking or the means or force used was unlikely to produce grievous bodily harm.

[143]Because of the danger involved in the Manual provides that even when used as a bludgeon a loaded firearm merits the additional five years confinement in an aggravated assault. Part IV, para. 54c(4)(a)(ii) (MCM 1984).

[144]The punishments are also similar and reflect the 1982 changes to the Manual. *See* MCM, 1969, para. 127*c;* Exec. Order No. 12,383, 47 Fed. Reg. 42,317 (1982). An exception is that the aggravating factor of "while in a hostile fire pay zone" was changed to "while receiving special pay under 37 U.S.C. § 310." The change means that the service member who commits an offense while drawing hostile fire pay falls within the aggravating factor whether or not the service member is actually within the hostile fire pay zone. Currently there are three hostile fire pay zones: Vietnam, Cambodia, and Iran.

[145]S. Rep. No. 53, 98th Cong., 1st Sess, 29 (1983).

[146]Subject matter jurisdiction over the offense may in some instances, however, create problems. *See, e.g.*, Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983).

authority to provide for crimes and offenses under Article 134[147] or to modify elements of offenses under the other punitive articles.[148] Where the drafters merely incorporated case law into the Manual, the validity of the Manual provision is clear. Where the drafters went beyond existing case law, however, the provisions must await judicial approval.

An important example of the limited presidential authority in this area is the 1984 Manual's treatment of Article 91. Article 91 protects warrant officers, noncommissioned officers, and petty officers from assault, disrespect, and disobedience when they are in execution of their office. The 1951 and 1969 Manuals erred by listing the additional requirement that the victim be senior in rank to the accused as an element of Article 91.[149] The 1984 Manual drafters acknowledge the error of the previous Manuals[150] and relegate the superior status of the victim to an aggravating factor meriting increased punishment for assault and disrespect to a noncommissioned officer or petty officer.[151] This treatment of Article 91 has two important effects. First, failure to allege the superior status of the victim will not result in a fatally defective specification. Second, it is apparent that superiors such as higher ranking noncommissioned officers may commit offenses against junior noncommissioned officers under Article 91.

Two 1984 Manual offense modifications sure to receive judicial attention are changes to the elements of unconsummated assault under Article 128 and maiming under Article 124. Despite judicial authority to the contrary,[152] the 1984 Manual describes an attempt type unconsummated assault as a specific rather than a general intent crime.[153] Similarly, the Manual now states that maiming is no longer a general intent crime but rather requires a specific intent to injure (though not a specific intent to main).[154] These changes have important effects. First, voluntary intoxication will now be a defense to the attempt type unconsummated assault (though not to an offer type of unconsummated assault) and maiming. Second, the effect on aggravated assault with a dangerous weapon, means, or force must also be assessed. This kind of aggravated assault can be unconsummated and uses the same theories of

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[147]United States v. Johnson, 17 M.J. 251 (C.M.A. 1984).

[148]*See* notes 148-50 and accompanying text *infra*. *See also* United States v. McCormick, 30 C.M.R. 26 (C.M.A. 1960); United States v. Brown, 44 C.M.R. 412 (A.C.M.R. 1971).

[149]Para. 170 of the MCM, 1969 and MCM, 1951. *See also* MCM, 1969, App. 6, form specifications 24-26, and MCM, 1951, App. 6, form specifications 25-27. A superior status is required by statute under Articles 89 and 90 for disrespect, assault, and willful disobedience offenses against a commissioned officer.

[150]MCM, 1984, Part IV, para. 15c. (Analysis).

[151]MCM, 1984, Part IV, para. 15c(1)(e). Superior status is not an aggravating factor in assault or disrespect of a warrant officer. Also, superior status is not an aggravating factor in a disobedience offense under Article 91. The disobedience offense under Article 91 merely requires that the accused have a duty to obey the victim. MCM, 1984, Part IV, para. 15b(2).

[152]*See, e.g.*, United States v. Redding, 14 C.M.A. 242, 34 C.M.R. 22 (1963); United States v. Hand, 46 C.M.R. 440 (A.C.M.R. 1972).

[153]MCM, 1984, Part IV, para. 54c(1)(b)(i). Whether the drafters actually intended to change the elements of the attempt type assault is questionable. Although the explanation states a specific intent is required, there is no addition of specific intent in the listing of the elements of the offense. MCM, 1984, Part IV, para. 54b(1). Also, the Analysis indicates the drafters intended to perpetuate existing law rather than attempt to change the law. MCM, 1984, Part IV, para 54c (Analysis).

[154]MCM, 1984, Part IV, para. 50c(3). The problem of the intent required for maiming stems from interpreting the intent provision of Article 124 which states "[a]ny person ...who with intent to injure, disfigure, or disable...." In United States v. Hicks, 6 C.M.A. 621, 20 C.M.R. 337 (1956), the court stated that the statute's plain meaning was that it required only an intent to injure, not an intent to maim. If further approved as legally correct instructions that the offense "only requires a *general* intent to injure and not a specific intent to maim." (emphasis added). This was interpreted in para. 203, MCM, 1969 and by the Army Court of Military Review in United States v. Tua, 4 M.J. 761 (A.C.M.R. 1977), *petition denied*, 5 M.J. 91 (1978) to mean that maiming was a general intent crime. The drafters to the 1984 Manual state, however, that *Hicks* in fact requires a specific intent to injure. Part IV, para. 50c (MCM 1984) (Analysis). The confusion regarding the meaning of *Hicks* has persisted because in *Hicks* the court was focusing on what intent the accused must have, *i.e.*, intent to injure or intent to maim. *Hicks*, 6 C.M.A. at 624, 20 C.M.R. at 340. Though it approved the instruction quoted above, it did not address whether the intent must be a *general* intent to injure or maim or a *specific* intent to injure or maim.

attempt and offer as simple assault.[155] It would seem now, contrary to abundant judicial authority,[156] that the attempt type unconsummated aggravated assault would also require specific intent and be subject to a voluntary intoxication defense.

Another punitive article modified is Article 93, cruelty and maltreatment. The 1984 Manual expands the coverage of the article in two ways. First, relying on judicial authority,[157] the Manual clarifies who can be a victim of the offense by expressly including anyone subject to the accused's orders whether or not the victim is subject to the UCMJ. Thus, a civilian employee now clearly can be a victim. Second, the Manual explanation of the offense expressly includes sexual harassment as a form of cruelty and maltreatment and defines it as "influencing, offering to influence, or threatening the career, pay or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature."[158] While this Manual provision appears expansive, cruelty and maltreatment has been broadly interpreted to include any unjustified act that results in physical or mental pain or suffering[159] and sexual harassment easily fits within the interpretation.

The 1984 Manual's treatment of Article 134 offenses contains several noteworthy developments. Some offenses, such as criminal libel, are no longer mentioned in the Manual. Such offenses are still valid and may be charged, but they were so little used that the drafters decided they did not require attention in the Manual.[160] In this same light, some offenses which had been previously recognized in case law, such as kidnapping and jumping from a vessel, are now listed and discussed.[161]

An offense certain to be the most controversial of the newly listed offenses is fraternization.[162] The Manual offense only addresses officer-enlisted relationships and aims at relationships that violate the customs of a particular armed service and which compromise the chain of command, result in an appearance of partiality, or otherwise undermine good order, discipline, or morale.[163] While fraternization has long been recognized as an offense,[164] its precise meaning is still being developed. In *United States v. Johanns*,[165] the Court of Military Appeals has granted petition on the issue of whether consensual, private, heterosexual, nondeviate sexual intercourse by an Air Force officer with an enlisted member not under his supervision was a fraternization offense under Article 133 or 134. In *United States v. Stocken*,[166] a panel of the Army Court of Military Review held, consistent with the new Manual provision, that fraternization under Article 134 does not extend to relationships among enlisted members. The ultimate resolution of the cases[167] will, of course, impact on the Manual version of the offense.

D. Defenses

With the exception of R.C.M. 701's requirement for notice of alibi and mental responsibility defense,[168] the 1984 Manual's procedural and

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[155]*See generally* Military Judge's Benchbook, para. 3-109.

[156]*See supra* note 12.

[157]United States v. Dickey, 20 C.M.R. 486 (N.B.R. 1956).

[158]MCM, 1984, Part IV, para. 17c(2).

[159]United States v. Finch, 22 C.M.R. 698 (N.B.R. 1956).

[160]Other examples of offenses no longer listed are committing a nuisance, violation of parole, statutory perjury, allowing prisoner to do an unauthorized act, transporting a vehicle or aircraft in interstate commerce, and unclean accoutrements.

[161]Other examples of offenses newly listed in Article 134 are requesting commission of an offense, destruction of evidence to prevent seizure, bomb threat or hoax, and prostitution.

[162]MCM, 1984, Part IV, para. 83.

[163]The provision was not intended to preclude regulations which also regulate relationships among officers, enlisted or officers and enlisted. MCM, 1984, Part IV, para. 83c(2).

[164]*See generally* MCM, 1984, Part IV, para. 83 (Analysis).

[165]17 M.J. 862 (A.F.C.M.R. 1983).

[166]17 M.J. 826 (A.C.M.R. 1984).

[167]On 2 March 1984, a motion for reconsideration in United States v. Stocken was granted on the issue of whether an NCO could ever be convicted of fraternization under Article 134.

[168]*See supra* notes 59-63 and accompanying text.

substantive treatment of defenses contains few changes.

The special (affirmative) defenses are found in R.C.M. 916. As in the 1969 Manual, the rules themselves are short and general. The Discussions to the rules, while nonbinding, are fairly complete and along with the Analysis comprise a good treatment of the particulars of the defense.

Generally, the R.C.M.s, Discussion, and Analysis merely reflect the current state of case law. An exception is a more expansive interpretation of duress. Paragraph 215(f) of the 1969 Manual limited duress to situations where the accused himself feared death or great bodily harm. Cases had expanded this to family members or those with whom the accused had a close personal relationship.[169] R.C.M. 916(h) makes duress available if the accused's crime is caused by an immediate threat of death or serious bodily injury to the accused or any innocent person.

E. Conclusion

This section has addressed only highlights in crimes and defenses. Because so many other changes were made, the practioner would be wise to carefully consult the Manual and Analysis when considering a crime or defense. Reliance on memory of pre-1984 law will be dangerous.

X. Nonjudicial Punishment

Part V of the 1984 Manual implements Article 15, UCMJ. As in the past, it is heavily supplemented by service regulations. For the Army, Chapter 3 of the revised AR 27-10 will be the source of important guidance for practioners. The new Manual's nonjudicial punishment material is not in the format of rules and discussion, but is regulatory guidance in eight numbered paragraphs. The drafters' analysis of this section is the last portion of Appendix 21 to the Manual.

Paragraph 1 addresses general considerations and makes no substantive changes. The analysis does clarify one point, however. The prohibition on double punishment applies to punishments actually served and does not bar the imposition of a second Article 15 for the same misconduct where the original proceedings are set aside. What is prohibited is an increase in the amount of punishment or the reimposition of that portion of the punishment already served.

Paragraph 2 deals with who may impose nonjudicial punishment. Paragraph 3 details the right to demand trial. No substantive changes are made in either provision.

Paragraph 4 concerns the procedure for administering nonjudicial punishment. It eliminates the distinction that previously existed between the Army and Air Force procedures and the Navy and Coast Guard nonjudicial punishment process.

Paragraph 5 discusses punishments. There are two changes to note. First, detention of pay has been eliminated as a punishment option. Second, the apportionment of punishments process has been eliminated as an option. These changes are intended to simplify Article 15 procedures.

Paragraph 6 describes the procedures for suspending, vacating, mitigating, remitting, and setting aside punishments. The one significant change here requires that vacation of a suspended punishment "be based upon an offense under the code committed during the period of suspension."[170] That means that the conduct that causes a suspension to be vacated must also be a violation of the UCMJ. Failure to obey a nonpunitive regulation might not suffice, absent other service-discrediting circumstances. The same section provides for a vacation of punishment process intended to qualify the proceedings for admission at a subsequent court-martial.

Paragraph 7 sets forth the appeals process. The time during which appeals will be presumed to be timely filed is reduced to five days after imposition of punishment. The time the government has to complete action on the service member's appeal is expanded to five days,

[169] *See e.g.*, United States v. Barnes, 12 M.J. 779 (A.C.M.R. 1981) (fiancee).

[170] MCM, 1984, Part V, para. 6a(4).

although Chapter 3, AR 27-10 will continue the current three-day period for acting on an appeal from a summarized nonjudicial punishment. Under both forms of punishment, formal and summarized, the service member must request the remedy of interruption of loss of liberty punishments if the government fails to act within the applicable time limits. The imposition of additional proceedings is also authorized in paragraph 7. If an Article 15 is set aside on appeal for a "procedural error," a new proceeding may be conducted. Of course, the prohibitions against increasing punishment or double punishment discussed above apply.

Paragraph 8 delegates the regulatory task of creating, employing, and filing records of nonjudicial punishment to the service Secretaries.

XI. Constitutional Evidence

A. Fourth Amendment Rules

I. Introduction

Several provisions of the 1984 Manual deal with fourth amendment practice and procedure. These include new rules for apprehensions in private dwellings, changes to Military Rules of Evidence dealing with search and seizure, and the potential for conditional guilty pleas and negotiated confessional stipulations of fact to preserve motions to suppress for appeal.

Setting aside consideration of the wisdom of codifying rules of fourth amendment procedure, it is obvious that as constitutional interpretation by the courts changes or is modified, the Military Rules of Evidence pertaining to search and seizure will change as well. Because the Military Rules of Evidence do not automatically incorporate court interpretation as do changes to the Federal Rules of Evidence,[171] there will necessarily be a delay in adopting any new constitutional interpretation until the President amends the Manual for Courts-Martial. The Military Rules of Evidence pertaining to search and seizure[172] have not been changed since their effective date,[173] and it is only logical that the new Manual includes several changes in the fourth amendment area.

2. Apprehensions in Private Dwellings

Article 7 of the Uniform Code of Military Justice[174] sets forth the power of certain persons to make apprehensions of persons subject to the code. The basis for a lawful apprehension is probable cause to apprehend. Paragraph 19*a* of the 1969 Manual restates the provisions of Article 7 in slightly more detail.[175] Neither Article 7 nor paragraph 19, however, discuss the locus of an apprehension.

In 1980 and 1981, the Supreme Court decided two cases which specifically set forth requirements for arrests in private dwellings. The specific question presented in both cases was whether, absent consent or exigent circumstances, law enforcement officials should enter a private dwelling without prior judicial approval. While the specific factual context of each

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[171]*See* M.R.E. 1102.

[172]*See* M.R.E.s 311-317.

[173]The effective date of the Military Rules of Evidence was 1 September 1980.

[174]10 U.S.C. § 807 (1982).

[175]MCM, 1969, para. 19*a*, provides:

> 19. APPREHENSION. a. Who may apprehend. All commissioned officers, warrant officers, petty officers, noncommissioned officers, and, when in the execution of their guard or police duties. Air Force security police, military police, members of the shore patrol, and such persons as are designated by proper authority to perform guard or police duties, including duties as criminal investigators, are authorized to apprehend, if necessary, persons subject to the code or subject to trial thereunder upon reasonable belief that an offense has been committed and that the person apprehended committed it. See Article 7(b).
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> Petty officers, noncommissioned officers, and enlisted members performing guard or police duties should apprehend a commissioned or a warrant officer offender only pursuant to specific orders of a commissioned officer, except when this action is necessary to prevent disgrace to the service, the commission of a serious offense, or the escape of one who has committed a serious offense. In all cases involving the apprehension of commissioned officers and warrant officers by petty officers, noncommissioned officers, and enlisted members performing guard or police duties, the individual effecting the apprehension will, immediately thereafter, notify the officer to whom he is responsible or an officer of the Air Force security police, military police, or shore patrol.

case was somewhat different, the answer was a resounding "no."

In *Payton v. New York,*[176] law enforcement officials sought to arrest Payton in his rented apartment. Upon approaching the door of the apartment, they could hear light music from within. After receiving no response to their knock, the officers forcibly entered the apartment. Payton was not present, but the officers found a shell casing which was subsequently admitted into evidence at Payton's trial for murder. At issue was whether the entry into Payton's apartment was lawful and could support admissibility of the shell casing under the plain view doctrine. The Supreme Court found that the entry into a private dwelling was a substantial intrusion into an individual's reasonable expectation of privacy. Such intrusions could not be supported in the absence of consent or exigent circumstances without prior judicial approval. Finding that a judicially issued arrest warrant would have provided Payton with adequate protection against unreasonable intrusion, the Court held that in order to enter a person's private dwelling to arrest him or her, the arresting officers must have either consent, probably cause to arrest plus exigent circumstances, or a judicially issued arrest warrant for the person.[177]

Steagald v. United States[178] also involved an entry into a private dwelling to effect an arrest. The situation was somewhat different, however, in that the officers sought to enter a third party's residence to arrest an apparent nonresident. Armed this time with an arrest warrant, the officers entered the Steagald residence to arrest one Ricky Lyons. Inside the house the officers discovered cocaine which was offered at trial against Steagald. The Supreme Court noted that the officers' arrest warrant did nothing to protect the privacy interest of a third party owner/resident of the premises entered.[179] Essentially, the judicial determination of probable cause to arrest Lyons did nothing to protect Steagald's expectation of privacy in his dwelling and provided no judicial review of whether there was a reasonable belief that Lyons was present. Thus the Supreme Court held that to enter the private dwelling of a third party in search of the subject of an arrest warrant, that entry must be predicated upon either consent, probable cause to search plus exigent circumstances, or a judicially issued search warrant for the premises.[180]

Military cases have struggled with applying these concepts to apprehensions in the various types of military housing. In *United States v. Jamison,*[181] the Army Court of Military Review applied an authorization requirement to government quarters, but the court specifically declined to reach the issue of whether such an authorization requirement applied to barracks with their diminished expectation of privacy.[182] Nevertheless, the Court of Military Appeals cited the Army Court of Military Review in *United States v. Davis,*[183] and held unlawful an unauthorized apprehension in a barracks.[184] Further compounding the potential for confusion, Chief Judge Everett indicated after he took the bench that the court had not decided whether *Payton* even applied to the various types of military dwellings.[185]

R.C.M. 302(e)[186] seeks to clarify the requirement for prior authorization to apprehend or

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[176]445 U.S. 573 (1980).

[177]*Id.* at 576, 590, 603.

[178]451 U.S. 204 (1981).

[179]*Id.* at 213.

[180]*Id.* at 216.

[181]2 M.J. 906 (A.C.M.R. 1976).

[182]*Id.* at 910 n.4.

[183]8 M.J. 79 (C.M.A. 1979) (journal)

[184]Although the majority in *Davis* relied upon the Army court's opinion in *Jamison,* only Judge Cook's concurring opinion noted the fact that the Army Court had specifically limited their decision. *See* 8 M.J. at 79-81 (Cook, J., concurring in the result).

[185]United States v. Mitchell, 12 M.J. 265, 269 n.1 (C.M.A. 1982).

[186]R.C.M. 302 deals with apprehensions of persons subject to the code. In large part, the rule amplifies the provisions of Article 7 of the UCMJ.

arrest in private dwellings. Initially, subsection (1) sets forth the general rule in accordance with Article 7, UCMJ, *i.e.*, a properly empowered person may effect an apprehension on the basis of probable cause to apprehend at any place. Subsection (2) focuses specifically on apprehensions in private dwellings. First, R.C.M. 302(e)(2) defines "private dwelling" as including "dwellings" on or off a military installation, such as single family houses, duplexes, and apartments. The quarters may be owned, leased, rented by the residents, or assigned, and may be occupied on a temporary or permanent basis. This definition is not particularly revealing in terms of what it includes. It is significant, however, in terms of what the definition specifically excludes from the definition of a private dwelling: " 'Private dwelling' does not include the following, whether or not subdivided into individual units: living areas in military barracks, vessels, aircraft, vehicles, tents, bunkers, field encampments, and similar places." Apparently, it is the intent of the definition to focus on the relative degree of privacy associated with the various types of military housing arrangements and then determine which constitute "private dwellings" and afforded the protections of the remainder of the rule.[187] Quite simply, however, barracks living accommodations are excluded from the coverage of R.C.M. 302(e)(2), and an apprehension may be made in a barracks at any time, based upon probable cause, and without prior authorization.

Second, R.C.M. 302(e)(2) separates private dwellings into two general categories according to control and/or location. R.C.M. 302(e)(2)(C) includes any dwellings which are under military control, are military property, or are located in a foreign country (whether military property or not). Illustrative of dwellings, falling into this category are government family quarters on post, BOQs and BEQs,[188] housing owned or leased by the government off-post, and economy quarters in foreign countries. Such dwellings fall within the power of appropriate officials to authorize searches and seizures pursuant to M.R.E. 315.[189] Consequently, it is appropriate that commanders, military judges, and military magistrates be empowered by the rule to issue any necessary authorization to apprehend.

The second category of dwellings dealt with by R.C.M. 302(e)(2)(D) includes essentially "all others." This category primarily includes off-post, privately owned or leased housing in the continental United States and its territories. Such "civilian" quarters are generally beyond the scope of any authorizing official's powers under M.R.E. 315 and fall within the jurisdiction of civilian courts.

R.C.M. 302(e)(2) also specifies the requirements to enter a private dwelling in order to apprehend or arrest. Regardless of the categorization of the dwelling as military property, foreign, or civilian, an apprehension based upon probable cause may be made in a private dwelling pursuant to consent[190] or under exigent circumstances.[191] The presence of consent or exigencies simply removes any requirement for prior authorization.

The requirements for military property or property in a foreign country (R.C.M. 302(e)(2)(C)) will vary depending on whether the private dwelling to be entered is the residence of the apprehendee (the *Payton* situation) or is the residence of some third party (the *Steagald* situation). In order to enter the apprehendee's military or foreign private dwelling to effect an apprehension, the following requirements are imposed by R.C.M. 302(e)(2)(c)(i):

(1) At the time of the entry, the official

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[187]R.C.M. 302(e) (Analysis).

[188]Although this treatment includes the BOQ and BEQ within the definition of private dwelling, the drafters of this rule express no opinion on whether the BOQ and BEQ are within the definition of private dwelling. *See* R.C.M. 302(e) (Analysis). It is simply the conclusion of this article that the BOQ and BEQ have the attributes of a private apartment, are designed as an individual living space rather than a troop/unit living arrangement, and therefore should be accorded a reasonable expectation of privacy sufficient to qualify as private dwellings.

[189]*See* M.R.E. 315(c)(1) and (d).

[190]M.R.E. 314(c).

[191]M.R.E. 315(g).

effecting the apprehension must have a reasonable belief that the person to be apprehended is present in the dwelling; and,

(2) The apprehension must have been authorized by an appropriate official pursuant to MRE 315(d) upon a determination of probable cause to apprehend.

Two matters are worthy of note. One, the requirement for a reasonable belief that the apprehendee is present gives an element of timeliness to this particular intrusion. The intrusion is not permitted unless it would appear fruitful. Two, the authorization contemplated is one to apprehend. Consequently, the appropriate official to authorize the apprehension is either a military judge/magistrate or a commander with control over the person to be seized.[192] It is not necessary that the commander involved have control over the place within which the apprehension will take place.

If the military property or foreign dwelling is not the residence of the apprehendee, but is that of some third party, then the following requirements of R.C.M. 302(e)(2)(c)(ii) must be met:

(1) The entry to effect the apprehension must have been authorized by a proper official under M.R.E. 315(d);

(2) The official authorizing the entry must have made a determination that probable cause exists to apprehend the person; and

(3) The official authorizing the entry must have made a determination of probable cause to believe that the apprehendee will be present at the time of the entry.

In this situation, the proper authorizing official must have control or power over the place to be entered, not merely control over the person of the apprehendee.[193] In addition, the element of timeliness in this situation is determined by the authorizing official, not the effecting officer. Essentially, the basis for this authorization is very similar to that for an authorization to search: probable cause to believe that a specific item (the apprehendee) is in a specific place (the third party's dwelling).[194]

Next, subsection (e)(2)(D) sets out the requirements for apprehensions taking place in other than military property or in foreign countries. In order to apprehend an individual in his or her own residence off-post in the United States or its territories, the following requirements must be met:

(1) The officials seeking to effect the apprehension must have a reasonable belief that the person is present; and,

(2) The apprehension must be authorized by an arrest warrant issued by competent civilian authority.

Once again, the apprehending officers must determine that the entry to apprehend will be fruitful, *i.e.*, that the apprehendee is present. In addition, "competent" civilian authority must have issued an arrest warrant. In view of the fact that persons subject to the UCMJ are being apprehended for federal offenses, it would seem that such competent authority would be federal judges or magistrates.

When the off-post, United States apprehension is to be made in the dwelling of a third person, the following requirements must be met:

(1) The apprehension must be authorized by an arrest warrant issued by competent civilian authority; and

(2) The entry into the dwelling must be authorized by a search warrant issued by competent civilian authority.

Again one must be attuned to the fact that the civilian authority must be competent to issue the warrants to search for federal offenders.

It is worth noting that while the failure to comply with the foregoing requirements will not bear upon the apprehension per se, it will bear upon the admissibility of any evidence

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[192] *See* M.R.E. 315(c)(1) and (d)(1).

[193] *Id.*

[194] *See* M.R.E. 315(f)(2).

derived from either the entry or apprehension. For example, the plain view doctrine requires a lawful presence as a predicate to admissibility,[195] and searches incident to apprehension require a lawful apprehension as a predicate to admissibility.[196] In either situation, if the entry or the apprehension is not in accordance with the law, the derivative evidence is inadmissible.

R.C.M. 302(e)(2) concludes with an assertion that a non-resident will not have an adequate interest to challenge either the entry into another's residence or the sufficiency of the underlying basis for the warrant or authorization to enter. While an unlawful entry or inadequate basis for a warrant/authorization may violate the rights of the third party resident, R.C.M. 302(e) contemplates that the apprehendee will not have an adequate interest in the premises to challenge the entry or its basis. While this may be true in a general sense, it remains to be seen whether an individual apprehendee/non-resident can establish an adequate expectation of privacy which would permit challenging the entry or its basis in a given case.[197]

3. Military Rules of Evidence 311-316

Before proceeding to a discussion of specific changes made in the search and seizure rules, it is necessary to note one linguistic change. Within Part II of the 1984 Manual, practice and procedure is set forth in terms of "Rules for Courts-Martial." Within Part III, the evidence rules are denominated "Military Rules of Evidence." One can see the confusion that would result if the simple word "rule" becomes part of the military attorney's language. Thus, counsel must remain aware of the distinctions between Parts II and III of the 1984 Manual and adhere to a stricter nomenclature: "Rules for Courts-Martial" and "Military Rules of Evidence," or "R.C.M.s" and "M.R.E.s." Throughout the Military Rules of Evidence, the word "rule(s)" has been changed for clarity to "Military Rules of Evidence" (abbreviated "M.R.E.").

a. M.R.E. 311(i): Effect of guilty pleas

Prior to the effective date of the 1984 Manual, a provident guilty plea operates as a waiver of all fourth amendment motions, whether raised or not.[198] Under R.C.M. 910(a)(2) an accused will be permitted to enter a "conditional guilty plea" and preserve specified pre-plea motions for appellate review. The specifics of this new plea in military practice are discussed elsewhere in this article.

b. M.R.E. 312: Body views and intrusions

M.R.E. 312 was subjected to three "fix-it" changes which do not appear to have significantly altered the substance of the law. Initially, in the caption to M.R.E. 312 and throughout its provisions the word "bodily" has been changed to "body." Interestingly enough, the analysis to the change[199] attributes this to the Court of Military Appeals decision in *United States v. Armstrong.*[200] A footnote in that case reveals that the court elected to use the word "body" in conjunction with fluids to comport with dictionary definitions and word choice by the United States Supreme Court.[201]

Subsections (b)(1) and (c), dealing with involuntary visual examinations of the body and intrusions into body cavities, have also undergone minor linguistic changes. With regard to subsection (b)(1), involuntary visual examinations of the body may be made pursuant to M.R.E. 314(b) (border searches) and M.R.E. 314(c) (searches upon entry to or exit from United States military installations abroad) if there exists a "reasonable" suspicion that the person is concealing evidence of a crime, contraband, or weapons. Prior language required that such searches be based upon "real" suspicion. Similarly, subsection (c) was changed from "real" to "reasonable" suspicion as the standard in support of body cavity intrusions

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[195]M.R.E. 316(d)(4)(C).

[196]M.R.E. 314(g).

[197]*See* M.R.E. 311(a)(2).

[198]*See* United States v. Hamil, 15 C.M.A. 110, 35 C.M.R. 82 (1964).

[199]M.R.E. (Analysis).

[200]9 M.J. 374 (C.M.A. 1980).

[201]*Id.* at 378 n.5.

under M.R.E. 314(h) (jail searches for weapons, contraband, or evidence of a crime). The change in language from "real" to "reasonable" suspicion was designed to eliminate any confusion which might result from the injection of language that might imply some higher standard.[202]

Finally, the caption to M.R.E. 312(d) was changed to substitute to word "extraction" for "seizure." M.R.E. 312(d) was intended to apply to the physical, involuntary taking of body fluids. The change in the caption is designed to clarify the scope of the rule and eliminate the possibility that compusory production of urine during a health and welfare inspection would fall within the scope of M.R.E. 312(d).[203]

c. M.R.E. 313: Inspections and inventories in the armed forces

Perhaps the most significant change in the Military Rules of Evidence pertaining to search and seizure is found in M.R.E. 313(b) (Inspections). The drafters of the original M.R.E. 313(b) sought to formulate a rule which indicated that the inspection was a lawful command tool to insure the military readiness of an organization. In addition, M.R.E. 313(b) was designed to specifically sanction contraband and unlawful weapons inspections, and included provisions which made the use of a drug detection dog a lawful incident of a contraband inspection.[204] To prevent subterfuge inspections, M.R.E. 313(b) had a two-step formula for lawful contraband inspections: a determination of adverse affect and either reasonable suspicion or scheduling.

In some respects, however, the original M.R.E. 313(b) engendered subterfuge inspections. For example, the reasonable suspicion standard for contraband inspections could be read to imply that a focused criminal suspicion would support the administrative inspection. On the other hand, the rule seemingly precluded other lawful inspections. Illustrative of this is the fact that the commander had no means to conduct an immediate contraband inspection in the absence of any suspicion. Obviously, the need to insure that a unit is drug-free is legitimate, yet such a need was not recognized in the absence of suspicion or scheduling.

Impetus for changing M.R.E. 313(b) also came from recent decision of the Court of Military Appeals.[205] The court's focus has generally been upon the military purpose of inspections and whether those inspections were reasonable in relation to the purpose to be served. Although the potential for subterfuge concerned the court, the judges did not find it necessary to adopt any mechanical formula to preclude subterfuge. Instead, the court's focus was upon the commander's stated purpose for the inspection and the manner of its execution.[206] In some respects, M.R.E. 313(b) was much more rigid

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[202] M.R.E. 312 (Analysis).

[203] *See* Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983); M.R.E. 312(d) (Analysis).

[204] M.R.E. 313(b) (Analysis to original rules).

[205] *See* Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983); United States v. Brown, 12 M.J. 420 (C.M.A. 1982); United States v. Middleton, 10 M.J. 123 (C.M.A. 1981).

[206] *See* United States v. Brown, 12 M.J. at 422-23:

> There is no suggestion anywhere in the record—either in the testimony of the several prosecution and defense witnesses on the motion to suppress or in the circumstances surrounding the inspection—that the commander's concern was anything other than the general welfare and condition of his company. Indeed, in both its stated purposes and the manner of its performance, this is a classic example of the military necessary health-and-welfare inspection, which was recognized in *Middleton* as appropriate and lawful.
>
> ....
>
> While the scope of an inspection may be described in terms of area as it was in *Middleton*, it also may be described in terms of purpose.... [O]n the record before us, it does not appear that any of the multiple purposes of the inspection as set forth by Captain Wright properly led Lieutenant Witworth into a folded piece of paper which he removed from appellant's jacket pocket. While was recognized in *Middleton* the national defense imperative of health-and-welfare inspections, we also noted the vulnerability to abuse of this legitimate command tool. Accordingly, commanders and persons conducting such inspections must be ever faithful to the bounds of a given inspection, in terms both of area and purpose. [footnotes omitted].

and inflexible than was necessary to insure lawful, reasonable inspections.

As a result of the problems encountered with the inflexible rule and the Court of Military Appeal's broad treatment of inspections, three changes were made in M.R.E. 313(b). First, the additional mechanical steps of adverse affect and either suspicion or scheduling have been eliminated. The new M.R.E. 313(b) treats the contraband or unlawful weapons inspection the same as any other inspection. Essentially, if the primary purpose of the inspection is administrative, and if the conduct of the inspection is reasonable in terms of its scope and manner of execution, then the inspection is lawful. While the subterfuge inspection will still be unlawful, it is no longer critical that mechanical steps be followed.

Second, the new M.R.E. 313(b) recognizes that certain objective indicators cast significant doubt upon the purpose of a given inspection. In recognition of this potential and to insure that the purpose of an inspection is administrative, there is an enhanced burden of proof in certain instances. Specifically, where part of the purpose of an inspection is to locate contraband or unlawful weapons, and if:

> (1) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; or (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule.

It is not intended that the presence of any one of these factors be fatal to an inspection. Rather, the factors merely trigger an enhanced burden which focuses inquiry on the critical element: the commander's purpose. Similarly, the list of objective indications of subterfuge is not intended to be exhaustive. Counsel may well argue that other objective indications of subterfuge merit application of the "clear and convincing" standard.

The third change to M.R.E. 313(b) is the inclusion of specific language sanctioning an order to produce urine as a lawful incident of an inspection. Although the Court of Military Appeals specifically sanctioned command directed urinalysis for purposes similar to those which support a health and welfare inspection, the court declined to fit urinalysis into the confines of the original M.R.E. 313(b).[207] The additional language in the 1984 version simply affirms the court's conclusion that urinalysis is a lawful administrative intrusion.

d. M.R.E. 314: Searches not requiring probable cause

Three changes have been made to M.R.E. 314. In each instance, the change adopts changes or new interpretation in case law.

M.R.E. 314(c) initially provided authority for examinations of persons and property upon *entry* to military installations abroad. It was silent with regard to examinations upon exit. In *United States v. Alleyne*,[208] the Court of Military Appeals determined that the same needs which supported the commander's power to search upon entry supported the reasonableness of examinations or searches upon exit. Addressing the apparent limitation in M.R.E. 314(c) to entry, the court noted that the rules did not by their silence condemn other, reasonable searches.[209] The provisions of M.R.E. 314(c) have therefore been changed to include specific authority for border-type searches upon both "entry to and exit from" U.S. military installations overseas.

M.R.E. 314(f)(3) has been changed to adopt the decision of the Supreme Court in *Michigan v. Long*.[210] In *Long*, the Court found that the same need for protection of officers that supports a limited frisk of a person for weapons also supports a limited search of the passenger compartment of an automobile for weapons. Thus, if

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[207] *See* Murray v. Haldeman, 16 M.J. at 82.

[208] United States v. Alleyne, 13 M.J. 331 (C.M.A. 1982).

[209] *Id.* at 335.

[210] 103 S.Ct. 3469 (1983).

an officer has a reasonable belief based upon articulable facts that a person stopped may gain control of a weapon from an automobile, the passenger compartment may be searched for such a weapon. The standard for this "automobile frisk" is less than probable cause, but it must be based upon facts and the officer's experience. Additionally, the intrusion is limited to an examination for weapons. Objects not appearing to be weapons or dangerous to the officer may not be seized or further examined under M.R.E. 314(f)(3). That means that an officer could reasonably look inside a shoe box that could contain a pistol but would be precluded from opening a matchbox that might hold cocaine.

The final change to M.R.E. 314 also involves the automobile and Supreme Court case law. In *New York v. Belton*,[211] the Court created a bright-line rule concerning searches incident to apprehension. Generalizing that an occupant of a vehicle could reach the entire passenger compartment and any container therein, the Court held that the permissible scope of a search incident to the apprehension of a vehicle's occupant includes the passenger compartment and all containers therein. M.R.E. 314(g) has been modified to adopt the holding in *New York v. Belton*. Consequently, two significant aspects of *Belton* have been incorporated into military practice. First, containers in the passenger compartment may be searched whether open or not. Any privacy interest in the container gives way to the legitimate purposes of a search incident to apprehension. Second, so long as the person was apprehended in a vehicle, it makes no difference that the apprehendee may have been removed from the vehicle before the search command. The search only need be a relatively contemporaneous incident of the apprehension.

e. M.R.E. 315: Probable cause searches

In *United States v. Kalscheuer*,[212] the Court of Military Appeals effectively ruled that M.R.E. 315(d)(2) concerning delegation of the power to authorize searches was unconstitutional. The 1984 Manual recognizes the *Kalscheuer* decision by eliminating delegation entirely. Even though the Court of Military Appeals implied that some limited delegations may be permissible,[213] there is no effort to create a limited rule of delegation which would comport with the court's suggestions. Delegation is simply out.

A second minor change to M.R.E. 315 is found in subsection (g). Previously, it was provided that a vehicle would be presumed to be operable for purposes of the automobile exception.[214] This language could have been interpreted to permit an accused to show that the vehicle was in fact inoperable, and defeat application of the automobile exception. Therefore, the language indicating that operability was a presumption was eliminated. This change reflects the basic thrust of the fourth amendment: objective reasonableness. The concern is properly on what the reasonable officer knew or should have known at the time.[215]

The major change in M.R.E. 315 is a modification of the definition of probable cause to search. The original language required that "[b]efore a person may conclude that probable cause to search exists, he or she must first have a reasonable belief that the information giving rise to the intent to search is believable and has a factual basis." By its clear language, this provision applied the two-pronged test of *Aguilar v. Texas*[216] to all military probable cause to search determinations. In fact, it reasonably appeared to establish a two-step predicate to even considering information offered in support of a request to search. Additionally, the language seemingly required independent satisfaction of both the "believable" and "factual" prongs: overkill of one did nothing to satisfy the other.

In *Illinois v. Gates*,[217] the Supreme Court

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[211]453 U.S. 454 (1981).

[212]11 M.J. 373 (C.M.A. 1981).

[213]*Id.* at 378.

[214]*See* M.R.E. 315(g)(3).

[215]M.R.E. 315(g) (Analysis).

[216]378 U.S. 108 (1964).

[217]103 S.Ct. 2317 (1983).

rejected application of the traditional two-pronged analysis in favor of a totality-of-the-circumstances test for probable cause. The Court determined that a rigid application of the two-pronged test was inconsistent with a reasonableness analysis of probable cause which the majority felt should guide the magistrate's determination. Consequently, after *Gates* it was no longer necessary in the federal civilian sector to satisfy the independent prongs of veracity and basis of knowledge before the authorizing official could assess probable cause to search. Instead, the test became a reasonable assessment of all the facts and circumstances, including consideration of basis of knowledge and veracity, to determine whether items related to criminal activity were in a specific place.[218]

M.R.E. 315(f)(2) has been modified to eliminate entirely the language establishing "factual" and "believable" as predicates to determining probable cause. In its place, the drafters intend that the new totality-of-the-circumstances test be used. Unfortunately, neither the Supreme Court nor the Analysis to 1984 Manual give much guidance on the mechanics of the new test or on how the "relevant" considerations of basis of knowledge and veracity fit into the new analysis. Counsel will need to carefully review future case law to determine the particulars of the new totality test. In the meantime, the old two-pronged analysis "remains good advice for those deciding the existence of probable cause, especially for uncorroborated tips, but it is not an exclusive test."[219]

f. M.R.E. 316: Seizures

M.R.E. 316 has two changes. The first is found in subsection (b). The definition of probable cause to seize has been modified to eliminate the requirement that information be "factual" and "believable" before it may be considered in determining probable cause to seize. This change once again adopts the decision of the Supreme Court in *Illinois v. Gates* as discussed above.

Subsection (d)(5) has been modified to indicate that M.R.E. 316 is not intended to prevent seizure of property on less than probable cause when permitted by the Constitution. This change is based upon the Supreme Court decision in *United States v. Place.*[220] There the Court extended the doctrine of "stops" developed in *Terry v. Ohio*[221] to personal property. Where an officer has a reasonable suspicion based on experience and articulable facts that an object is or contains contraband, that item may be temporarily detained or seized for investigatory purposes. The duration of such stops is strictly limited to the investigatory purpose. Usually, this is a short time to either dispel the suspicion or develop probable cause. If the investigation is fruitless, however, the property must be released.

4. Fourth Amendment Practice and Procedure

a. Conditional guilty pleas; R.C.M. 919(a)

As noted previously under M.R.E. 311(i), a plea of guilty waives fourth amendment motions. Plea practice in the military has been modified, however, to permit the "conditional guilty plea."[222] R.C.M. 910(a)(2) authorizes an accused to enter a plea of guilty and preserve in writing specified pre-plea motions which would otherwise have been waived by the provident plea of guilty. The use of such a plea is limited by the fact that both the military judge and the government[223] must consent. Obviously, the conditional guilty plea could be used as a device to preserve a fourth amendment motion to suppress for appeal. Nevertheless, because such pleas are designed to preserve judicial and governmental resources, it is conceivable that

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[218] *Id.* at 2339.

[219] M.R.E. 315(f)(2) (Analysis).

[220] 103 S.Ct. 2637.

[221] 392 U.S. 1 (1968).

[222] The usefulness of the conditional guilty plea was pointed out by Chief Judge Everett in United States v. Schaffer, 12 M.J. 425, 428 n.6 (C.M.A. 1982). *See also* Fed. R. Crim. P. 11.

[223] R.C.M. 910(a) provides that "unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the government. AR 27-10, paragraph 5-23*b* (draft), provides that in the Army only the general court-martial convening authority may consent to a conditional plea on behalf of the government.

government representatives will conclude that full litigation of a fact-specific fourth amendment motion followed by appellate litigation will do little to preserve government resources.

b. Negotiated confessional stipulations of fact: R.C.M. 705(b)

Another device which will permit the accused to preserve fourth amendment motions for appeal is the confessional stipulation.[224] R.C.M. 705(b), which deals with pretrial agreements, specifically authorizes the negotiated confessional stipulation in lieu of a negotiated plea of guilty. By this method, the accused enters a plea of not guilty, and the merits of the case are decided on the basis of the stipulation. Thereafter, the accused will get the benefits of the plea negotiations when the convening authority takes action. Because the plea is not guilty, any fourth amendment motion raised in a timely manner will be preserved for appeal. Once again, whether this will provide any significant savings in terms of judicial or government resources is questionable. It may, however, be a valuable device for the accused who wishes to preserve a fourth amendment motion and have the protections of a sentence limitation.

B. Eyewitness Identification: Amendment to M.R.E. 321

Recognizing the dangers to the accused inherent in lineups and other identification procedures, the Supreme Court in the *Wade-Gilbert-Stovall*[225] trilogy constitutionalized the area of eyewitness identification. *Wade* and *Gilbert* protected the accused by providing a right to counsel at a lineup. *Stovall* protected the accused from identification procedures that violated due process. M.R.E. 321 attempted to codify these constitutional rules. The 1984 amendments to M.R.E. 321 affect both the right to counsel and due process rules.

1. Right to Counsel

In *Wade* the Supreme Court held that a lineup, as a critical stage of a criminal prosecution, required the presence of counsel.[226] The Court believed the presence of counsel would minimize the likelihood of suggestive police practices and allow an informed challenge to suggestive procedures at trial through effective cross-examination. In *Gilbert*, the Court announced a per se exclusionary rule. If the right to counsel was violated, no testimony was permitted concerning the unlawful identification. Further, no later identifications, including in-court identifications, were admissible unless shown by clear and convincing evidence to be based upon an independent source.[227]

The right to counsel rule was limited in two ways. First, it only applied to corporeal lineups[228] and showups.[229] Second, the Supreme Court held in *Kirby v. Illinois* that it applied when adversary judicial criminal proceedings, such as a formal charge, preliminary hearing, indictment, information, or arraignment, had been initiated.[230] Although every court of appeals had held prior to *Kirby* that the right to counsel attached at apprehension,[231] the Supreme Court ruled that it did not apply that early in the process. The rule has been much criticized because the need for protection from suggestive identification procedure is even greater in the investigation phase.[232]

The 1969 Manual, in para. 153*a*, implemented the right to counsel rule in an expansive manner. The right attached when the accused was a suspect, regardless of whether any adver-

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[224]*See* United States v. Schaffer, 12 M.J. at 428 n.6.

[225]United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

[226]388 U.S. at 273.

[227]*See also* Moore v. Illinois, 434 U.S. 2210 (1977) (unlawful showup not admissible even if based upon an independent source).

[228]United States v. Ash, 413 U.S. 300 (1973).

[229]United States v. Moore, 434 U.S. 220 (1977).

[230]Kirby v. Illinois, 406 U.S. 682 (1972).

[231]*See generally* N. Sobel, Eyewitness Identification, Legal and Practical Problems 2-8 (2d ed. 1983). Also, many stages have held that the right to counsel attaches at the apprehension stage.

[232]*See generally* L. Taylor, Eyewitness Identification 147, 148 (1982).

sarial criminal proceedings were initiated. The original M.R.E. 321(b)(2)(A) attempted to conform military law to *Kirby* by stating the right to counsel attached when charges were preferred or pretrial restraint under para. 20 was imposed (pretrial confinement, restriction, or arrest).[233] Although this rule cut back on the accused's entitlement to counsel, it had the advantage of being easy to apply. It is far easier to determine when charges have been preferred, for example, than to determine whether a soldier has become a suspect.

The amendment to the counsel rule of M.R.E. 321 results from incorporating by reference the expanded definition of pretrial restraint under R.C.M. 304, which goes beyond the former para. 20 to include conditions on liberty as a form of pretrial restraint that triggers the right to counsel. Because of the broad definition of conditions on liberty and because any commissioned officer may impose conditions on liberty on any enlisted person,[234] the rule could be accidentally triggered or be triggered without the knowledge of the trial counsel or law enforcement agency.

The discussion and language of R.C.M. 304 show that the rule is not aimed at a one time order such as to report for interrogation or to be in a lineup,[235] or that it was meant to include an apprehension.[236]

Finally, the amended M.R.E. 321(b)(2)(A) only requires that pretrial restraint under R.C.M. 304 be imposed and does not require that the restraint be continuing or in effect at the time of the lineup.[237] This problem, which also existed with the old rule, has never been judicially addressed. For example, will the soldier who is restricted to the company area for one day to be available for questioning be entitled to counsel three weeks later at a lineup even though charges have not been preferred and no other forms of pretrial restraint have been imposed?

Until the rule is clarified, the government must be cautious. Investigation must be done before each lineup to determine if any commissioned officer has given any order related to the offenses that could be construed as a condition on liberty. If such an order has been given, counsel should be provided or a photographic lineup done instead. Further, to lessen the chance of an unknown triggering of the right to counsel, it may be advisable to formally restrict the authority to impose all forms of pretrial restraint to commanders.[238]

2. Due Process

In the seminal due process case concerning eyewitness identification, *Stovall v. Denno*,[239] the Supreme Court established a right to exclude identification testimony that resulted from unnecessarily suggestive identification procedures that were conducive to irreparable mistaken identity. For example, in *Stovall*, a showup in the victim's hospital room was found to be suggestive but necessary under the circumstances because of the victim's critical condition.[240] The focus was apparently on the identification *procedure*. If the procedure was unnecessarily suggestive, due process was violated.

In *Neils v. Biggers*[241] and *Manson v. Brathwaite*,[242] the focus was not on the identification procedure but the identification itself. The

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[233] Analysis of the Military Rules of Evidence, MCM, 1969, Appendix 18 [hereinafter cited as Analysis to original rules].

[234] R.C.M. 304(b)(2). *See also supra* notes 13-22 and accompanying text.

[235] *See generally* United States v. Hardison, 17 M.J. 701 (N.M.C.M.R. 1983).

[236] *See generally* M.R.E. 321 (Analysis to original rules).

[237] *Cf.* R.C.M. 707(b)(2), which tolls the running of time for speedy trial purposes if the pretrial restraint is lifted for a significant period. *See also supra* notes 82-86 and accompanying text.

[238] *See* R.C.M. 304(b)(4).

[239] 388 U.S. 293 (1967).

[240] Generally, one person lineups or showups that are not on the scene are found to be suggestive.

[241] 409 U.S. 188 (1972).

[242] 432 U.S. 98 (1977).

Court held that even an unnecessarily suggestive identification need not be excluded if the totality of circumstances indicate it is reliable. Thus, even unnecessarily suggestive procedures such as one photo lineups or one person showups done without exigent circumstances would not be excluded so long as the identification was reliable. The *Biggers* and *Manson* opinions contain a five-part test to determine the reliability of the identification: "[T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation and the time between the crime and the confrontation."[243] In *Manson*, the Court concluded that trial courts should determine the admissibility of identification testimony by balancing the identification factors as measured by the five-part test against the corrupting effect of the unnecessarily suggestive procedures.[244]

The problem with the original M.R.E. 321 was that it did not clearly embrace the *Mason* reliability test as the standard for admissibility for pretrial identification evidence. M.R.E. 321(b)(1) defined unlawful lineups or other identification processes as those which were "unnecessarily suggestive." The exclusionary rule itself, M.R.E. 321(d)(2), stated that unnecessarily suggestive pretrial identification procedures were excludable. Although the language of the rule was clear, the Analysis in three places stated that *Mason's* reliability test was the standard.[245]

The amended M.R.E. 321 clearly adopts the *Mason* reliability test as the standard for determining the admissibility of pretrial identification evidence. M.R.E. 321(b)(2) defines unlawful as unreliable. Unreliable is defined as whether "under the circumstances [the identification process] is so suggestive as to create a substantial likelihood of misidentification." The Analysis to the amended rule adopts the Supreme Court's reliability test of *Mason*, balancing the five identification factors against the corrupting effect of an unnecessarily suggestive identification.[246] Also, the amended exlusionary rule, M.R.E. 321(d)(2), now states that the government must prove by a preponderance that the identification process was reliable.

There may be some lingering confusion, however, on how to apply the independent source test. The rule and the Analysis are silent. The problem arises because M.R.E. 321(d)(2) states that even if the pretrial identification is unreliable, the witness may still make an in-court identification if the government proves by clear and convincing evidence that the in-court identification is based upon an independent source and not on the unreliable pretrial identification. The problem, which stems from the underlying cases and not with the rule, is a logical one because the test for independent source requires yet another analysis of the factors surrounding the witness' opportunity to observe and strength of identification.[247] If the pretrial identification process was so corrupted by the suggestive police procedures as to be unreliable,

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[243]432 U.S. at 114. *See also* United States v. Quick, 3 M.J. 70 (C.M.A. 1977).

[244]432 U.S. at 114.

[245]As this is written, the Court of Military Appeals has not directly addressed the conflict between the plain language of the rule and the drafter's Analysis. *See, e.g.*, United States v. Tyler, 17 M.J. 381 (C.M.A. 1984). In United States v. Batzel, 15 M.J. 640 (N.M.C.M.R. 1982), a panel of the Navy-Marine Corps of Military Review ignored the rules' language and analyzed separately whether the showup was unnecessarily suggestive and reliable. In United States v. White, 17 M.J. 953 (A.F.C.M.R. 1984), a panel of the Air Force Court of Military Review court applied the plain language of the rule to approve exclusion of an unnecessarily suggestive identification procedure.

[246]Some courts, however, have adopted a two-step test. First, it is determined if the identification procedure was unnecessarily suggestive. Second, the suggestiveness is balanced against the five identification factors. If the procedure was not unnecessarily suggestive, however, the identification is simply admitted without further analysis. *See e.g.*, United States v. Thevis, 665 F.2d 616 (5th Cir. 1982). A two-step approach is supported by the language of M.R.E. 321(b)(1) because the definition of unreliable requires the identification procedure to be suggestive.

[247]United States v. Wade, 388 U.S. 218, 241 n.33 (1977). *See generally* United States v. Fors, 10 M.J. 367 (C.M.A. 1981) (independent source found despite lineup that violated the right to counsel and was unnecessarily suggestive); United States v. Quick, 3 M.J. 70 (C.M.A. 1977).

how could there be an independent source for the in-court identification? A finding of unreliability necessarily means that the witness' initial perceptions were weak and uncertain. This problem has caused commentators to suggest that a more logical and consistent approach would be to admit or exclude both pretrial and in-court identification evidence based upon the reliability factors.[248]

[248]*See generally* N. Sobel, Eyewitness Identification, Legal and Practical Problems 4-12 (2d ed. 1983).

4. Conclusion

The amended rule will clarify the law by clearly adopting the *Manson* reliability standard as the due process standard for admission of pretrial identification procedures. Potential problems with conditions on liberty triggering the right to counsel and application of the independent source test to unreliable pretrial identifications must await judicial clarification.

Appendix A

Sample A—Short Form, Referral

DEPARTMENT OF THE ARMY
HEADQUARTERS, FORT BLANK
Fort Blank, Missouri 77777

AKPS-JA 10 June 198X

MEMORANDUM FOR COMMANDING GENERAL

SUBJECT: Advice on Disposition of Court-Martial Charges

1. I have reviewed the attached charges, allied papers, and report of investigation in the case of Private E-1 Willie E. Smith, 429-86-4916, U.S. Army, Headquarters Company, 1st Battalion, 69th Infantry, Fort Blank, Missouri, and render this advice in accordance with the provisions of Article 34, Uniform Code of Military Justice, and R.C.M. 406, Manual for Courts-Martial, 1984.

2. Legal Conclusions. After reviewing the attached charges, allied papers, and report of the Article 32 investigation I have reached the following legal conclusions:

a. Each specification alleges an offense under the Uniform Code of Military Justice.

b. The allegations in each specification are warranted by the evidence indicated in the report of the Article 32 investigation.

c. There is court-martial jurisdiction over the accused and all charged offenses.

3. Recommendations. I recommend that all charged offenses be tried by general court-martial and that the case be referred to trial by General Court-Martial Convening Order Number 14, Headquarters, Fort Blank, Missouri, dated 1 May 198X.

/s/
DONALD S. DOE
Colonel, JAGC
Staff Judge Advocate

DIRECTION OF THE CONVENING AUTHORITY:

All recommendations of the Staff Judge Advocate are (approved) (disapproved).

JAMES E. RYDER
Major General, USA
Commanding

Sample B—Short Form, Partial Referral

DEPARTMENT OF THE ARMY
HEADQUARTERS, FORT BLANK
Fort Blank, Missouri 77777

AKPS-JA 10 June 198X

MEMORANDUM FOR COMMANDING GENERAL

SUBJECT: Advice on Disposition of Court-Martial Charges

1. I have reviewed the attached charges, allied papers, and report of investigation in the case of Private E-1 Willie E. Smith, 429-86-4916, U.S. Army, Headquarters Company, 1st Battalion, 69th Infantry, Fort Blank, Missouri, and render this advice in accordance with the provision of Article 34, Uniform Code of Military Justice, and R.C.M. 406, Manual for Courts-Martial, 1984.

2. Legal Conclusions. After a thorough review of the attached charges, allied papers, and report of the Article 32 investigation I have reached the following legal conclusions:

a. Each specification charged alleges an offense under the Uniform Code of Military Justice.

b. The allegations in the specifications to Charge I and Charge II are warranted by the evidence indicated in the report of Article 32 investigation. The allegations contained in Charge III and its specifications are *not* supported by the evidence in the report of the Article 32 investigation and may not be referred to a general court-martial.

c. There is court-martial jurisdiction over the accused and all charged offenses.

3. Recommendations.

a. I recommend that the offenses contained in Charges I and II be tried by general court-martial and that the case be referred to trial by General Court-Martial Convening Order Number 14, Headquarters, Fort Blank, Missouri, dated 1 May 198X.

b. I recommend that Charge III and its specifications be withdrawn.

/s/
DONALD S. DOE
Colonel, JAGC
Staff Judge Advocate

DIRECTION OF THE CONVENING AUTHORITY:

All recommendations of the Staff Judge Advocate are
(approved) (disapproved).

JAMES E. RYDER
Major General, USA
Commanding

Sample C—Long Form With Optional Information

DEPARTMENT OF THE ARMY
HEADQUARTERS, FORT BLANK
Fort Blank, Missouri 77777

AKPS-JA 10 August 1985

MEMORANDUM FOR COMMANDING GENERAL

SUBJECT: Advice on Disposition of Court-Martial Charges

1. I have received the attached charges, allied papers, and report of investigation in the case of Private E-1 Willie E. Smith, 429-86-4916, U.S. Army, Headquarters Company, 1st Battalion, 69th Infantry, Fort Blank, Missouri, and render this advice in accordance with the provisions of Article 34, Uniform Code of Military Justice, and R.C.M. 406, Manual for Courts-Martial, 1984.

2. (OPTIONAL) Personal Data Concerning Accused.

a. Date of Birth: 8 May 1958

b. Martial Status: Married

c. Number of Dependents: 3

d. Prior Military Service:

Dates	Service	Discharge
14 March 1977-14 March 1979	U.S. Army	Honorable

e. Current Service: 15 April 1982 for 4 years.

f. Aptitude Area GT Score: 87

g. Education: High School Graduate

h. Prior Disciplinary Record: Article 15—Assault—15 May 1982.

i. Prior Convictions: None.

j. Restraint: Restriction to company area, 24 June 1985.

3. (OPTIONAL) Summary of Charges:

Charge	Art. UCMJ	Spec	Gist of Offense	Maximum Punishment Authorized
I	86	1	AWOL 6 June 1983-3 June 1984	DD, Conf. 1 yr, TF, RLEG
		2	AWOL 7 June 1984-24 June 1985	DD, Conf. 1 yr, TF, RLEG

4. (OPTIONAL) Summary of Available Evidence:

a. On 6 June 1983 the accused, without authority, absented himself from his unit and remained absent until 3 June 1984 when he was apprehended by civilian authorities in St. Louis, Missouri.

b. On 7 June 1984, after being in military control for only four days, the accused again absented himself from his unit without authority. He remained absent until he voluntarily turned himself into the Fort Blank military police station on 24 June 1985.

5. (OPTIONAL) Extenuating and Mitigating Factors:

a. In an unsworn statement given at the Article 32 investigation the accused stated that he went AWOL because his mother was ill and had financial problems. PVT Smith is the sole source of support for his mother.

b. The accused is qualified as a sharpshooter with the M-16 rifle.

6. (OPTIONAL) Recommendations:

a. Unit Commander: General Court-Martial.

b. Battalion Commander: General Court-Martial.

c. Brigade Commander: General Court-Martial.

d. Article 32 Investigating Officer: General Court-Martial.

7. Legal Conclusions. After reviewing the charges, allied papers, and report of the Article 32 investigation I have reached the following legal conclusions:

a. Each specification alleges an offense under the Uniform Code of Military Justice.

b. The allegations in each specification are warranted by the evidence indicated in the report of the Article 32 investigation.

c. There is court-martial jurisdiction over the accused and all charged offenses.

8. Staff Judge Advocate Recommendation: I recommend that all charged offenses be tried by general court-martial and that the case be referred to trial by Court-Martial Convening Order Number 14, Headquarters, Fort Blank, Missouri, dated 1 May 1985.

/s/
DONALD S. DOE
Colonel, JAGC
Staff Judge Advocate

DIRECTION OF THE CONVENING AUTHORITY:

All recommendations of the Staff Judge Advocate are
(approved) (disapproved).

JAMES E. RYDER
Major General, USA
Commanding

Appendix B

Recommendation of the Staff Judge Advocate

United States v. Orwell

_____

_____

(date)

SUBJECT: Staff Judge Advocate's Recommendation in the (General) (Special) Court-Martial Case of *United States v. James Orwell.*

Commander
1984th Division
Fort Farm, MO 12345

1. Herein is my recommendation under R.C.M. 1106 in the (General) (special) court-martial case of *United States v. James Orwell,* Specialist Four, U.S. Army, 123-45-6789, Headquarters and Headquarters Company, 1984th Division.

2. In accordance with his plea the accused was found guilty of the following offense(s): (brief statement of each offense; *e.g.,* wrongful possession of marijuana on 13 Aug 84; wrongful distribution of marijuana on 13 Aug 84; aggravated assault on a military policeman on 13 Aug 84). [The accused was found not guilty of the following offense(s): (brief statement of each offense).] The court-martial adjudged the following sentence: (brief description of sentence; *e.g.,* dishonorable discharge, confinement for four years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade). [*This paragraph could be done in a chart format.*]

[The following is a summary of the charges, specifications, pleas, findings and sentence in this case:

CH.	ART.	SPEC.	GIST OF OFFENSE	PLEA	FIND
I	112(a)	1	Possession of marijuana on 13 Aug 84	G	G
I	112(a)	2	Distribution of marijuana on 13 Aug 84	G	G
II	128	The	Aggravated assault on 13 Aug 84	G	G

Sentence adjudged: DD, Conf. 30 months, TF, RED-LEG]

3. The accused has been in the Army for 32 months. His MOS is 91T, animal care specialist. He has received the Army Service Ribbon. He has one prior conviction by a summary court-martial for a 3 day AWOL and one instance of nonjudicial punishment. [*This paragraph may be a more extensive resume of the service member's career when appropriate.*]

4. The accused was not subject to any pretrial restraint. [The accused was in (pretrial confinement) (restriction) for 36 days before trial.]

5. The accused pleaded guilty pursuant to a pretrial agreement in which you agreed to approve a sentence no greater than a bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances and reduction to the lowest enlisted grade. Accordingly, you cannot approve any sentence in excess of the terms of the agreement. [The accused's plea of guilty was entered pursuant

to a pretrial agreement in which you agreed to limit the maximum punishment to a bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The agreement also obligated the accused to testify in the court-martial of SSG Farmer, a suspected drug dealer. The accused refused to testify at that trial on 30 September 1984. Accordingly, you are not bound by the sentence limitation contained in the pretrial agreement.]

[*If the accused has not submitted matters under R.C.M. 1105 which allege legal error and the staff judge advocate does not deem it appropriate for the convening authority to take corrective action on the findings or sentence, the following paragraph is unnecessary.]*

6. The accused submitted a memorandum (attached at Tab A) pursuant to R.C.M. 1105(b)(1) alleging that testimony was improperly admitted in presentencing proceedings and asking you to reduce the severity of the sentence. I disagree. [The accused's offenses consisted of selling some marijuana from the front seat of the commander's official car to an undercover police agent. When the military policeman then apprehended the accused, the accused assaulted him with the car. The military judge properly allowed the accused's commander to describe these offenses. Such misconduct merits a severe sentence. Accordingly, no corrective action is necessary.]

[*The following paragraph is only used when the staff judge advocate deems it appropriate to call additional matters to the convening authority's attention. Such matters may be from outside the record of trial.* But see *R.C.M. 1107(b)(3)(B)(iii).*]

7. In a stipulation of expected testimony your predecessor condemned the accused's misconduct but added that SP4 Orwell was a competent driver and had rehabilitation potential. [*This paragraph could also call the convening authority's attention to matters other than legal errors, if any, in the accused's matters submitted under R.C.M. 1105. Such matters need not be discussed in the post-trial recommendation.*]

8. I recommend that you approve only so much of the sentence adjudged as provides for a bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. [The accused's motive for not testifying was a threat to his life made by SSG Farmer. Under these circumstances, I think he should retain the benefit of his pretrial agreement.] [I recommend that you approve the sentence as adjudged.] If you agree with this recommendation an action designed to accomplish the foregoing is attached at Tab B.

9. This recommendation has been served on the defense counsel who then had five days to submit a response. If the defense counsel submitted a response, it is attached at Tab A for your consideration.

AL S. BABYLON
LTC, JAGC
Staff Judge Advocate

Appendix C

**Review of a Court-Martial
by a Judge Advocate
[In Cases Forwarded to the
GCMCA Under R.C.M. 1112(e)]**

(Date)

SUBJECT: Review of the (General) (Special) (Summary) Court-Martial Case of United States v. Orwell.

Commander
1984th Division
Fort Farm, Missouri 12345

1. Pursuant to R.C.M. 1112(a), the attached record of trial in the (general) (special) (summary) court-martial case of *United States v. James Orwell*, Specialist Four, U.S. Army, 123-45-6789, Headquarters and Headquarters Company, 1984th Division, has been reviewed by the undersigned judge advocate.

2. Based upon my review of the record (and the matters submitted by the accused under R.C.M. 1105, [1106(f)], [and 1112(d)(2)]), I have concluded that:

a. The court-martial had jurisdiction over the accused and each offense as to which there is a finding of guilty which has not been disapproved [The court-martial lacked jurisdiction over the accused] [The court-martial had jurisdiction over the accused but lacked jurisdiction over all the offenses as to which findings of guilty have been approved] [The court-martial had jurisdiction over the accused but lacked jurisdiction as to (specify which charges and specifications, *e.g.*, charge I, specification 1). The court-martial had jurisdiction over the remaining offenses as to which there are findings of guilty which have not been disapproved];

b. Each specification [None of the specifications] as to which there is a finding of guilty which has not been disapproved states an offense [The only specification on which there is a finding of guilty which has not been disapproved fails to state an offense] [The (specify which specification, *e.g.*, specification of charge I or first and third specifications of charge I) fail to state offenses. The remaining specifications as to which there are findings of guilty which have not been disapproved state offenses]; and

c. The sentence is legal [The sentence is not legal].

[*These following paragraphs are only necessary if the accused has submitted written allegations of error pursuant to R.C.M. 1105, 1106(f), or 1112(d)(2)*].

3. In a memorandum submitted pursuant to R.C.M. 1105 the accused alleged that it was error for the military judge not to suppress the marijuana seized from the accused. [The military judge, in my opinion, properly ruled that the accused was lawfully apprehended at the time the marijuana was seized and, therefore, the seizure was lawful. The accused's allegation of error merits no relief.][I agree that the seizure of the marijuana from the accused was unlawful in this case. The accused should be given appropriate relief.]

In response to the post-trial recommendation in this case, the accused alleged that the testimony of his immediate commander was improperly admitted at trial and that this inadmissible evidence

was prejudicial to the accused by causing the members to impose an unduly harsh sentence. [In my opinion the military judge properly admitted the commander's testimony during the presentencing portion of the trial as evidence in aggravation (*see* R.C.M. 1001(b)(4)). No sentence relief is warranted.] [I agree that the commander's testimony was under the circumstances unfairly prejudicial and should have been excluded by the judge (*see* M.R.E. 403). The accused is entitled to appropriate relief by decreasing the terms of the approved sentence.]

The accused submitted a memorandum to me during the course of my review of his record of trial. In it he alleged that it was error for the convening authority to not reduce his sentence in conformity with the pretrial agreement. [In my opinion, the failure of the accused to testify in the court-martial trial of SSG Farmer, as required by an express condition in the pretrial agreement, justified the convening authority's decision not to be bound by the terms of agreement. Accordingly, no relief is warranted.] [In my opinion the accused should have been given the benefit of his pretrial agreement. His failure to testify as required by the pretrial agreement is excusable in light of the threat made against his life by SSG Farmer. Therefore, the accused's sentence should be reduced to the terms of the agreement.]

[*In cases forwarded to the GCMCA for action on a specific recommendation as to appropriate corrective action, if any, and an opinion as to whether corrective action is required by law must be stated.*]

4. In light of the foregoing discussion, I recommend that [you take no corrective action in this case as none is appropriate or required by law. Accordingly, the initially approved sentence should be approved, and, as it is thus finally affirmed, the bad-conduct discharge should be executed. If you agree with this recommendation, a form of action designed to accomplish the foregoing is attached as Tab A.] [you take corrective action in this case by disapproving the finding of guilty of charge I, specification 1 (wrongful possession of marijuana on 13 Aug 84). This action is required as a matter of law because of the violation of the servicemember's constitutional rights under the 4th Amendment. If you agree with this recommendation, it would be appropriate to reduce the accused's sentence. I recommend a reduction to a bad-conduct discharge, confinement for eighteen months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. This reduction in sentence is not required as a matter of law because the sentence as approved is not in excess of the maximum sentence which could have been adjudged for the remaining offenses. An action designed to accomplish the foregoing is attached at Tab A.] [*you take corrective action in this case by reducing the accused's sentence to a bad-conduct discharge, confinement for eighteen months, forfeiture of all pay and allowances, and reduction to the grade of Private E-1. Corrective action to reduce the sentence is required by law because the military judge improperly admitted testimony in aggravation of the accused's offenses during the presentencing stage of the trial. No specific quantity of reduction in sentence is required but in my opinion the improperly admitted evidence probably had a substantial impact on the sentence adjudged by the members. Accordingly, the substantial relief recommended is appropriate. If you agree with this recommendation an action designed to accomplish the foregoing is attached at Tab A.*] [you take corrective action in this case by reducing the accused's sentence to the agreed upon level in the pretrial agreement, to wit: a bad-conduct discharge, confinement for thirty months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. This corrective action, although appropriate in my opinion, is not required by law. Because the accused did not fulfill his obligations under the pretrial agreement the convening authority was not bound by the sentence limitation agreed upon therein, but I think the accused's reason for not testifying as he agreed to do was a legitimate and compelling concern for his personal safety. He should retain the benefit of his pretrial agreement. If you agree with this recommendation an action designed to accomplish the foregoing is attached at Tab A].

AL S. BABYLON
LTC, JAGC
Staff Judge Advocate

Post-Trial Submissions to the Convening Authority Under the Military Justice Act of 1983

Andrew S. Effron, Esq.
Office of General Counsel, Department of Defense

I. Introduction

The post-trial responsibilities of the convening authority have been changed considerably by the Military Justice Act of 1983.[1] Under prior law, the convening authority was required to insure the legal sufficiency of the proceedings and to approve both the findings and the sentence.[2] In all general courts-martial and in those special courts-martial where a bad-conduct discharge was adjudged, a detailed legal review of the case was prepared by the convening authority's staff judge advocate (SJA) or legal officer.[3] As the Senate Armed Services Committee noted in its report on the new legislation:

> When laymen presided over all courts-martial and lay officers served as counsel, there was a clear basis for requiring legal review in the field and requiring action on issues of law by the convening authority. This is less the case today when virtually all special and all general courts-martial are tried before military judges and qualified attorneys and all cases are subject to review by qualified attorneys. Moreover, as a result of court decisions, the staff judge advocate's review required in certain cases has become a cumbersome document which produces a substantial strain on legal resources, often is too lengthy to be of use to the convening authority, and can constitute an independent source of appellate litigation even when the underlying case is otherwise free of error.[4]

The Act is designed to correct these problems by focusing the attention of the convening authority on matters of direct interest to the exercise of command responsibilities. The convening authority is not required to conduct a legal review of the proceedings; such a review is left to appellate authorities.[5] The convening authority must act on the sentence in every case by approving the sentence, disapproving it in whole or in part, or modifying the punishment so long as it is not made more severe.[6] A review of the legality of the sentence is not required, however, because action on the sentence "primarily involves a determination as to whether the sentence should be reduced as a matter of command prerogative (*e.g.*, as a matter of clemency) rather than a formal appellate review."[7]

The convening authority is not required to act on the findings.[8] However, the convening authority, as a matter of discretion, may dismiss a charge or specification, modify a finding to a lesser included offense, or order a rehearing or proceedings in revision.[9] The action on the findings, like the action on the sentence, "is a matter of [a] commander's prerogative that is taken in

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**The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of the Department of Defense or any other government agency.*

[1]Pub. L. No. 98-209, 97 Stat. 1393 (1983), *reprinted in* The Army Lawyer, Jan. 1984, at 38.

[2]Uniform Code of Military Justice arts. 60, 64, 10 U.S.C. §§ 860, 864 (1982) (prior to amendment by the Military Justice Act of 1983) [hereinafter cited as U.C.M.J.]. Note that the pertinent portions of the Military Justice Act of 1983 discussed in this article apply only to cases in which the findings and sentence are adjudged on or after 1 August 1984. The Military Justice Act of 1983, § 12(a)(4); Exec. Order No. 12,473 48 Fed. Reg. 17,152 (1984).

[3]U.C.M.J. art. 61 (prior to amendment by the Military Justice Act of 1983).

[4]S. Rep. No. 53, 98th Cong., 1st Sess. 7 (1983).

[5]*Id.* at 7, 19; H. R. Rep. No. 549, 98th Cong., 1st Sess. 15 (1983).

[6]U.C.M.J. art. 60(c)(3), *amended by* the Military Justice Act of 1983, § 5(a)(1); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1107(d) [hereinafter cited as MCM, 1984, R.C.M.].

[7]H.R. Rep. No. 549, *supra* note 4, at 19.

[8]U.C.M.J. art. 60(c)(3), *amended by* the Military Justice Act of 1983, § 5(a)(1); MCM, 1984, R.C.M. 1107(c).

[9]See the sources cited at *supra* note 8.

the interests of justice, discipline, mission requirements, clemency, or other appropriate reasons and is not a review for legal sufficiency."[10]

The changes in the responsibilities of the convening authority under the Act are accompanied by changes in the role of the SJA. In the past, submissions by the SJA to the convening authority were drafted with the primary goal of avoiding allegations of error on appeal. This led to lengthy legal discussions in post-trial reviews that were of little practical use to the convening authority when acting on the case. Under the Act, post-trial submissions by the SJA will be drafted for the sole purpose of aiding the convening authority in exercising the post-trial responsibilities of the commander.[11] The new legislation expands the opportunity for defense counsel to submit matters to the convening authority. The key will be for counsel to develop a concise form of communication that assists the convening authority in acting on the case.

This article will outline briefly the rules governing such submissions in terms of content and timing.[12]

II. Submissions in General Courts-Martial and Special Courts-Martial in Which a Bad-Conduct Discharge Has Been Adjudged

A. The Defense Submission Under R.C.M. 1105

Under Rule for Courts-Martial (R.C.M.) 1105(b), the defense may submit to the convening authority any written matters which reasonably may tend to affect the convening authority's discretion to approve, disapprove, or modify the sentence under R.C.M. 1107.[13] The defense also may submit any written matters which reasonably may tend to affect the convening authority's decision as to whether discretion should be exercised to modify the findings or to order other proceedings. As will be noted below,[14] the defense frequently may find it advantageous to combine in a single document the submission under R.C.M. 1105 with the defense's response to the SJA's recommendation under R.C.M. 1106.

Under the broad guidance set forth in R.C.M. 1105(b), the defense is virtually unrestricted as to the type of matter that may be provided to the convening authority. It would be a mistake, however, for the defense to feel obligated to retry the case before the convening authority. Counsel should exercise professional judgment on a case-by-case basis to determine which aspects of the trial or post-trial proceedings would be particularly helpful in obtaining a sentence reduction or other corrective relief. What might be useful before one convening authority might not be helpful before another. Likewise, extenuating or mitigating factors are likely to differ widely from case to case. Counsel should tailor submissions with respect to specific cases and convening authorities and should avoid a shotgun approach to post-trial submissions.

In general courts-martial and special courts-martial in which a bad-conduct discharge has been adjudged, the service record of the accused need not be summarized because such a summary will be set forth in the SJA's post-trial recommendation. The submission under R.C.M. 1105, however, provides an opportunity for the defense to emphasize a particular aspect of the accused's service record that might be especially persuasive to the convening authority. A concise discussion of the key points in extenuation or mitigation is likely to be more effective than a lengthy discussion of peripheral matters.

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[10]S. Rep. No. 53, *supra* note 4, at 19.

[11]In the context of noting the changes brought about by the Military Justice Act of 1983, the House Armed Services Committee noted in its report that: "The staff judge advocate will continue to play an important role in assembling the materials to be used by the convening authority in exercising [his or her]. . . prerogative, and the accused will have an opportunity to submit sentencing materials to the convening authority and to rebut the recommendation of the staff judge advocate." H.R. Rep. No. 549, *supra* note 5, at 15.

[12]This discussion is limited to matters under MCM, 1984 R.C.M.s 1105 and 1106 and does not consider other submissions such as a petition for deferment of confinement under R.C.M. 1101 except as specifically noted herein.

[13]*See* U.C.M.J. art. 60(b), *amended by* the Military Justice Act of 1983, § 5(a)(1).

[14]*See* section II.D. *infra*.

Because the convening authority is not acting as an appellate tribunal, the accused is not required to raise legal objections to the court-martial in the submission under R.C.M. 1105 in order to preserve such objections for appellate consideration.[15] The Military Justice Act of 1983, which does not require the convening authority to act on the findings, reflects congressional anticipation that the defense normally will not raise legal errors in the submission to the convening authority.[16] The Act recognizes, however, that there may be circumstances in which corrective action in the field can be taken when the convening authority agrees that there has been an error at trial. Because a trial error need not be raised before the convening authority to be preserved, and because appellate authorities will correct any such error without regard to the convening authority's position, there will normally be little benefit in raising an issue that, in counsel's judgment, is not likely to change the convening authority's decision. On the other hand, it might be useful to raise a clear error on an established point of law that can be corrected by the convening authority with attendant benefit to the accused in terms of a change in the findings or sentence. Again, the determination as to what, if any, legal issues to raise is left to the sound judgment of counsel.

B. The SJA's Post-Trial Recommendation Under R.C.M. 1106

The staff judge advocate[17] is required by R.C.M. 1106 to provide a recommendation to the convening authority prior to that official's action on the sentence.[18] The rule notes that "[t]he purpose of the recommendation...is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative.... The recommendation shall be a concise written communication."[19]

Under R.C.M. 1106(d)(1), the SJA must use the record of trial in preparing the recommendation. R.C.M. 1106(d)(3) sets forth specific requirements with respect to discussing the findings and sentence, summarizing the accused's service record, and providing information on pretrial restraint and pretrial agreements (if any). The rule also requires a specific recommendation for action on the sentence. In addition, if the accused raises legal issues in a post-trial submission under R.C.M. 1105, R.C.M. 1106(d)(4) requires the SJA to include a statement of agreement or disagreement, but an analysis or supporting rationale for the statement is *not* required. R.C.M. 1106(d)(5) permits the SJA to include additional matters deemed appropriate, including matters from outside the record. When using matters from outside the record, the SJA should insure that the matter is both relevant and necessary to the convening authority's decision in order to avoid unnecessary appellate litigation.

C. The Defense Response Under R.C.M. 1106

The SJA's recommendation must be served on the defense and the defense may submit a response under R.C.M. 1106.[20] Under R.C.M. 1106, as under R.C.M. 1105, the defense is virtually unrestricted as to the type of material that may be included in the submission to the convening authority.[21]

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[15]*See* the Discussion accompanying MCM, 1984, R.C.M. 1105(d)(4) *Cf.* S. Rep. No. 53, *supra* note 4, at 21.

[16]*See* 129 Cong. Rec. S-5612 (daily ed. April 28, 1983) (remarks of Sen Jepsen); S. Rep. No. 53, *supra* note 4, at 18.

[17]The rule provides that this function may be performed by the convening authority's "staff judge advocate or legal officer." As a matter of convenience, the term staff judge advocate or SJA will be used in this article. The rule disqualifies any person who has acted as a court member, military judge, trial counsel, defense counsel, or investigating officer. R.C.M. 1106(b).

[18]*See* U.C.M.J. art. 60(d) *amended by* the Military Justice Act of 1983, § 5(a)(1).

[19]MCM, 1984, R.C.M. 1106(d)(1), (2). *See* S. Rep. No. 53, *supra* note 4, at 20.

[20]MCM, 1984, R.C.M. 1106(d)(3). *See* S. Rep. No. 53, *supra* note 4, at 20.

[21]The "response" to the SJA's recommendation is not limited to matters in rebuttal: "Counsel for the accused... may [use the response to] comment on any other matter." MCM, 1984, R.C.M. 1106(f)(3). This provides ample leeway to include any matter that can be submitted under MCM, 1984, R.C.M. 1105.

D. Relationship Between the Opportunity to Make a Submission Under R.C.M. 1105 and the Opportunity to Respond to the SJA's Recommendation Under R.C.M. 1106

Although the defense is not required to submit matters to the convening authority, the opportunity to focus the convening authority's attention to particular matters showing that the accused deserves clemency should not be treated lightly by counsel. This does not mean that the defense must make submissions both prior to and after receiving the SJA's recommendation. Indeed, for tactical reasons, in many cases it might be wise for defense counsel to withhold making any submission until after reviewing the SJA's recommendation.[22] The benefits of a single submission include clarity, completeness, and conciseness of response. The convening authority's attention can be focused on the most significant sentencing considerations, unencumbered by legal technicalities.

E. The Staff Judge Advocate's Addendum

After the SJA's recommendation under R.C.M. 1106 has been served on the defense, the SJA may supplement the recommendation with an addendum. If the addendum contains new matter, it must be served on the defense and the defense must be given a further opportunity to comment. Although the Discussion accompanying R.C.M. 1106(f)(7) provides some guidance as to what constitutes "new matter," the SJA should err on the side of caution and provide the defense an opportunity to respond if there is reasonable doubt as to whether the addendum constitutes new matter. The cost to the government of providing the defense with an additional five days at that stage is likely to be small compared to the burdens imposed as a result of needless appellate litigation.

There is one situation in which an addendum and an opportunity to respond will be required. Because the defense is likely to combine the submissions under R.C.M. 1105 and R.C.M. 1106 in a single document, there will be cases in which the defense decides to raise allegations of legal error to the convening authority after service of the SJA's recommendation on the accused. If the defense has raised legal errors within the time limits provided by R.C.M. 1105, the SJA must issue an addendum to the recommendation containing a statement of agreement or disagreement with the views of the defense in accordance with R.C.M. 1106(d)(4).[23]

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[22]An exception might arise in a case where the defense is submitting a petition for deferral of confinement under MCM, 1984, R.C.M. 1101(c). In such a case, the defense might decide that it would be desirable to marshal the best arguments for clemency in a single document to make the best presentation to the convening authority. An early submission also might be desirable if the defense is confident that a particular line of argument might influence the SJA's recommendation. In other cases, however, the defense is likely to find it advantageous to assess the SJA's recommendation before determining how best to present matters to the convening authority.

The defense also might wish to make a separate submission under MCM, 1984, R.C.M. 1105 if it intends to raise a legal error to the convening authority and it anticipates that the SJA's recommendations will not be prepared until the deadline for a submission under R.C.M. 1105 has expired. This is because the SJA must provide a statement of agreement or disagreement with allegations of legal error under R.C.M. 1105, but is not required to respond to a defense submission under R.C.M. 1106. In practice, this is not likely to be a problem for two reasons: first, because the convening authority no longer serves as an appellate tribunal, it is anticipated that the defense will concentrate on extenuation and mitigation rather than legal errors in post-trial submissions; and second, SJAs are encouraged to serve the recommendation on the defense as soon as possible, which normally will be well within the time for making a submission under R.C.M. 1105.

A defense decision to defer making a submission until responding to the SJA's recommendation does not constitute a waiver of the right to submit matters to the convening authority. Even if the defense expressly waives the right to make a submission under R.C.M. 1105(d)(3), it does not constitute a waiver of the right to respond to the SJA's recommendation under MCM, 1984, R.C.M. 1106.

[23]In most cases the deadline for making a submission under MCM, 1984, R.C.M. 1105 will not expire until after the deadline for a response to the SJA under R.C.M. 1106. *See* Appendix B. In the event that the deadline under R.C.M. 1105 expires before the deadline under R.C.M. 1106, the SJA is not required expressly by R.C.M. 1106(d)(4) to issue a statement of agreement or disagreement with defense allegations of legal errors raised under MCM, 1984, R.C.M. 1100(f). Although an issue raised after the deadline under R.C.M. 1105 does not require a formal statement under R.C.M. 1106(d)(4), the SJA, as a matter of sound practice, should give an allegation of legal error the same consideration that is given to any other issue raised by the defense under R.C.M. 1106.

F. Deadlines for Submissions by the Defense

There are three separate provisions governing the deadlines for submissions by the defense:

> The defense has thirty days after announcement of the sentence to submit matters under R.C.M. 1105. This period may be extended by the convening authority for not more than an additional twenty days for good cause.[24]
>
> The defense has a minimum of seven days after being served with the authenticated record to submit matters under R.C.M. 1105. This period may be extended by the convening authority for not more than an additional ten days for good cause.[25]
>
> The defense has a minimum of five days to respond to the SJA's recommendation under R.C.M. 1106. This may be extended for not more than an additional twenty days for good cause.[26]

These rules, which are the result of amendments during the legislative process,[27] create substantial potential for confusion because the three time periods do not necessarily operate sequentially. The SJA should establish procedures for advising the defense of the precise dates on which submissions are due in order to avoid confusion. This determination by the SJA will no doubt guide the convening authority's action as a matter of sound practice. Any disagreement by the defense should be promptly aired, however, and a mutually agreed upon date determined.

(1) Establishing clear deadlines

There are two easy ways to avoid confusion in the post-trial submission process:

> The SJA should advise the defense in writing of the precise date on which submissions are due.[28] Although there is a practical interrelationship among the various deadlines, they each have a distinct legal basis. Each deadline should be calculated separately to avoid confusion.
>
> The SJA should establish procedures for insuring that the record is served on the accused as soon as possible after sentence announcement and that the SJA's recommendation is served on the defense shortly thereafter.[29] The longer it takes for these tasks to be accomplished, the greater the possibility that confusion will result from overlapping deadlines.

(2) Calculating deadlines for submissions by the defense under R.C.M. 1105

After the findings and sentence are announced, calculate the date that falls thirty days after sentence announcement and advise the defense in writing that the thirty day deadline for submissions under R.C.M. 1105 falls on that date.[30]

If the record is served on the defense within twenty-three days after sentence announcement, remind the defense in writing of the date that falls thirty days after sentence announcement and that any submission under R.C.M. 1105 must be received by that date.[31]

If the record is served on the defense twenty-four or more days after sentence announcement, calculate the date that falls seven days after service of the record and advice the defense in

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[24]U.C.M.J. art. 60(b)(1) *amended by* the Military Justice Act of 1983, § 5(a)(1); MCM, 1984, R.C.M. 1105(c)(1).

[25]U.C.M.J. art. 60(b)(3), *amended by* the Military Justice Act of 1983, § 5(a)(1); MCM, 1984, R.C.M. 1105(c)(1).

[26]U.C.M.J. art. 60(d), *amended by* the Military Justice Act of 1983, § 5(a)(1); MCM, 1984, R.C.M. 1106(f)(5).

[27]*See* 129 Cong. Rec. S-5612-13 (daily ed. Apr. 28, 1983).

[28]There is no regulatory requirement that the accused be notified of the deadlines. However, notification can avoid confusion and appellate litigation. Note also that proof of service of the record is required under MCM, 1984, R.C.M. 1104(b), which provides the SJA an opportunity to establish the deadline and inform the accused.

[29]There is no regulatory requirement that these actions be taken within a minimum number of days; the suggestions in the text are made solely in the interest of reducing processing times and minimizing the possibility of error in computing post-trial submission deadlines.

[30]*See* Appendix A, Example 1.

[31]*See* Appendix B, Example 2.

writing that any submission under R.C.M. 1105 must be received by that date.[32]

(3) Calculating deadlines for defense responses to the SJA's recommendation under R.C.M. 1106

The SJA should calculate the date that falls five days after the SJA's recommendation is served on the defense and advise the defense in writing that a response under R.C.M. 1106 must be received by that date.[33]

From the defense perspective, note that if the five-day period for responding to the SJA's recommendation falls within the period for making a submission under R.C.M. 1105, the defense may make a submission under R.C.M. 1105 even if it misses the deadline for responding to the SJA under R.C.M. 1106.[34]

The SJA should not delay serving the recommendation simply to reduce the amount of time that the defense may use for submitting a response. Early service of the SJA's recommendation reduces the chance that the defense will be able to establish a basis for requesting an extension of the periods for making submissions. Delayed service increases the possibility that the accused will request an extension of the deadline to address matters in the recommendation, thereby delaying the convening authority's action on the case, with the concommitant adverse effect on processing times.

(4) Extension of deadlines for defense submissions

The convening authority, for good cause, may extend the deadline for submitting matter under R.C.M.s 1105 and 1106. The good cause requirement establishes a fairly rigorous standard, and it is not anticipated that such extensions will routinely be requested or granted.[35] A defense request for an extension should be brought to the convening authority's attention as soon as counsel perceives a problem in meeting the deadline, and should briefly specify the basis for the delay and the number of days requested.[36]

The rules governing extension of time provide a maximum number of days that may be granted by the convening authority. The convening authority can provide less than the maximum extension if requested by the defense or if the convening authority determines that the number of days requested by the accused is not justified under the good cause standard.

The deadline under R.C.M. 1105 may be extended for a maximum of twenty days. Under R.C.M. 1106, the deadline for responding to the SJA's recommendation may also be extended for a maximum of twenty days. Because the deadlines under these two different rules will frequently fall on different days, the maximum twenty-day period for an extension under R.C.M. 1106 may fall before, after, or at the same time as the maximum extension of the

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[32] *See* Appendix B, Example 5.

[33] There is no regulatory requirement to notify the defense of the deadline. However, it will be necessary to have some proof of service of the recommendation, and this provides an opportunity for giving such notice. *See* MCM, 1984, R.C.M. 1106(f)(1) (Discussion).

[34] *See* Appendix B, Example 2.

[35] "What constitutes good cause is left to the sound discretion of the convening authority...but generally speaking it could encompass [the] need for an extension to deal with special circumstances, such as unavailability of counsel due to illness, emergency leave, or other required absence, or other special facts such as involvement of counsel in another case of unusual complexity or an unusually heavy caseload.... [It does not] generally include the need to tend to other routine, ongoing responsibilities such as the normal caseload within a jurisdiction. Requests for extension [s]hould be brought to the convening authority as soon as the counsel perceives a problem in meeting the normal deadline, and [s]hould briefly specify the basis for the delay and the number of days requested." 129 Cong. Rec. S-5612 (daily ed. April 28, 1983) (remarks of Sen Jepsen).

"[G]ood cause for an extension ordinarily does not include the need for securing matters which could reasonably have been presented at the court-martial." R.C.M. 1105(c)(5). Although not expressly applicable to a request for an extension to respond to the SJA's recommendation, the same consideration should apply under R.C.M. 1106. As noted by the House Armed Services Committee in its report on the legislation: "[T]he opportunity to submit matters to the convening authority does not relieve the accused of the responsibility for gathering material that should be presented at trial." H.R. Rep. No. 549, *supra* note 5, at 15.

[36] *See supra* note 35.

deadline for a submission under R.C.M. 1105. The possibilities are illustrated by the examples in Appendix C. It is imperative that the defense clearly specify whether the extension is requested under R.C.M. 1105 or R.C.M. 1106 in order to permit proper consideration of the request.

In many cases, a brief extension should suffice to meet the needs of the defense. However, if a lengthy extension can be justified by good cause, the defense should follow these guidelines:

If the deadline for responding to the SJA under R.C.M. 1106 falls within twenty-nine days of sentence adjudication, any request for a lengthy extension should be made under R.C.M. 1105.

If the deadline for responding to the SJA under R.C.M. 1106 falls thirty or more days after sentence adjudication, the defense should consult the examples in Appendix C to calculate whether a request under R.C.M. 1105 or R.C.M. 1106 will provide a longer extension.

(5) Calculating deadlines for the defense responses to the SJA's addendum under R.C.M. 1106(f)(7)

After the defense has had an opportunity to comment on the SJA's recommendation, the SJA may attach an addendum. If the addendum contains new matter, the defense must be given the same response opportunity that is applicable to the SJA's initial recommendation, *i.e.*, five days to respond, with a twenty-day extension for good cause. The same tactical considerations for requesting extensions that apply to the initial recommendation apply with respect to extensions of the deadline for responding to an addendum. Counsel should consult Appendix C to determine the most advantageous rule under which the extension should be requested.

III. Submissions in Non-BCD Special Courts-Martial

A. The Defense Submission Under R.C.M. 1105

R.C.M. 1105(b) does not distinguish between types of courts-martial and the content of the defense submission; after a special court-martial in which a bad-conduct discharge (BCD) was not adjudged, the defense is as unrestricted in its submission as it would be after a more serious case, but there are different deadlines for the submission.

There is a practical difference, however, because the SJA does not prepare a recommendation after a non-BCD special court-martial. This means that the defense cannot rely on the SJA to summarize the pertinent aspects of the accused's service record or other key aspects of the proceeding that are important to the defense. Although this does not impose a significant burden on the defense, it will require the defense to alter slightly the nature of its presentation to the convening authority. There is no burden on the defense, however, to prepare a comprehensive post-trial review. As with the submission after a more serious case, the matters presented to the convening authority should reflect counsel's professional judgment as to the type of submission that will best serve the interests of the accused before the particular convening authority.

The absence of a requirement for a formal SJA recommendation in non-BCD special courts-martial continues prior practice. As in the past, the convening authority may refer the case to the SJA for informal advice. Although this does not invoke the formal procedures of R.C.M. 1106, the SJA should be careful to insure that the limits of R.C.M. 1107(b)(3) are observed with respect to matters that may be considered by the convening authority. For example, if the SJA submits "matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable," the accused must be given an opportunity for rebuttal under R.C.M. 117(b)(3).

B. Deadlines for Submissions Under R.C.M. 1105

The defense has twenty days to submit matters under R.C.M. 1105. This period may be extended by the convening authority for not more than an additional twenty days for good cause.

The defense also has a minimum of seven days after being served with the record to submit

matters under R.C.M. 1105. This period may be extended by the convening authority for not more than an additional ten days for good cause.

These deadlines operate in the same manner as the deadlines in more serious cases without the additional factor of the SJA's recommendation. The following suggestions for establishing deadlines are based on the examples in Appendix D:

> After the findings and sentence are adjudged, calculate the date that falls twenty days after sentence adjudication and advise the defense in writing that the twenty-day decline for submissions falls on that date.
>
> If the record is served on the defense within thirteen days after sentence adjudication, remind the defense in writing of the date that falls twenty days after sentence adjudication and that any submission under R.C.M. 1105 must be received by that date. In this case, the maximum extension of the deadline will be an additional ten days, *i.e.*, to thirty days after sentence adjudication.
>
> If the record is served on the defense fourteen or more days after sentence adjudication, calculate the date that falls seven days after service of the record and advise the defense in writing that any submission under R.C.M. 1105 must be received by that date. In this case, the maximum extension will be ten days from the end of the seven-day period.

IV. Summary Courts-Martial

The right to submit matters to the convening authority under R.C.M. 1105 also applies after summary courts-martial. The same general principles discussed above with respect to non-BCD special courts-martial apply to submissions after summary courts-martial, except with respect to deadlines. The accused has seven days after sentence announcement to make such a submission, which may be extended for ten days. There is no seven-day period following service of the record, which reflects the abbreviated nature of the record of a summary court-martial. However, the summary court-martial record must be served "promptly" on the accused, and failure to do so would constitute "good cause" for an extension of the deadline under R.C.M. 1105. An example of how these deadlines operate is set forth in Appendix D.

V. Conclusion

The opportunity to submit matters for the convening authority's consideration when acting on the sentence is an important right of the accused. Although the trial defense counsel bears the principal burden of protecting the accused's interests, the government's overall responsibility for the administration of the military justice system requires a cooperative, assisting attitude by the SJA. The legislative goal of the Military Justice Act of 1983, *i.e.*, reducing appellate litigation, will not be realized if the new rules are used to promote legal gamesmanship. Congress intended that the accused have an opportunity to submit matters after trial; that process should be facilitated, not frustrated. The practical guidance and examples for post-trial processing in this article are designed to further that congressional intent.

Appendixes

Appendix A: Calculating Time Periods

Example 1:

May 31 (Day 0): Sentence announcement.

June 30 (Day 30): Deadline for submission.

Comments. Under R.C.M. 103(9), the day on which a period begins does not count, but the day on which a period ends counts as one day. The above example illustrates R.C.M. 1105, which provides the defense with thirty days from sentence announcement for submission of matters to the convening authority.

Appendix B
Deadlines for Submissions Under R.C.M. 1105 and for Responses to the SJA Under R.C.M. 1106

Example 2: Record served on defense within twenty-three days after sentence announcement; SJA's recommendation served on the defense within twenty-four days after sentence announcement.

May 31 (Day 0): Sentence announcement.

June 10 (Day 10): Record served on defense.

June 15 (Day 15): SJA's recommendation served on the defense.

June 20 (Day 20): Deadline for defense response to SJA's recommendation.

June 30 (Day 30): Deadline for defense submission under R.C.M. 1105.

Comments: Because the record has been served on the accused within twenty-three days, the seven-day minimum period for review of the record will fall within the thirty-day period for a submission under R.C.M. 1105.

Under R.C.M. 1106, the defense has only five days after service of the SJA's recommendation in which to submit a response. However, under R.C.M. 1105, the defense has a minimum of thirty days after sentence announcement in which to submit "any matter" to the convening authority with respect to the findings and the sentence. Even if the accused fails to make a timely response within five days after the SJA's recommendation, the defense has the full thirty-day period in which to make a submission under R.C.M. 1105.

Because a response by the defense to the SJA's recommendation on day twenty does not automatically waive the right of the defense to make a submission under R.C.M. 1105 through day thirty, the convening authority cannot take action before day thirty unless the defense either expressly designates the earlier submission as being under both R.C.M. 1105 and 1106 or expressly waives the right to make a submission under R.C.M. 1105 and R.C.M. 1106.

Example 3. Record served on the defense within twenty-three days after sentence announcement; SJA's recommendation served on the defense twenty-five days after sentence announcement.

May 31 (Day 0): Sentence announcement.

June 20 (Day 20): Record served on defense.

June 25 (Day 25): SJA's recommendation served on the defense.

June 30 (Day 30): Deadline for defense submission under R.C.M. 1105 and response under R.C.M. 1106.

Comments: Because the record has been served on the defense within twenty-three days after sentence announcement, the seven-day minimum period for review of the record will fall within the normal thirty-day period for a submission under R.C.M. 1105.

The five-day period for responding to the SJA's recommendation under R.C.M. 1106 falls on the same day as the end of the period for making a submission under R.C.M. 1105.

The convening authority cannot act until both deadlines have expired, which is day 30 in the example, unless the defense expressly waives in writing the right to make submissions under both the R.C.M. 1105 and R.C.M. 1106.

Example 4. Record served on defense within twenty-three days after sentence announcement; SJA's recommendation served on the defense twenty-six or more days after sentence announcement.

May 31 (Day 0): Sentence announcement.

June 22 (Day 22): Record served on defense.

June 26 (Day 26): SJA's recommendation served on the defense.

June 30 (Day 30): Deadline for defense submission under R.C.M. 1105.

July 1 (Day 31): Deadline for defense response to the SJA's recommendation under R.C.M. 1106.

Comments: Because the record has been served on the accused within twenty-three days, the seven-day minimum period for review of the record will fall within the thirty-day period for a submission under R.C.M. 1105.

The five-day period for responding to the SJA's recommendation under R.C.M. 1106 falls after the end of the thirty-day period for making a submission under R.C.M. 1105. Even if the defense fails to make a timely submission under R.C.M. 1105, the same matter can be submitted in the response to the SJA's recommendation under R.C.M. 1106.

The convening authority cannot act until the five-day period for the response under R.C.M. 1106 has expired, which is day 31 in the example, unless the defense waives the right to respond expressly in writing.

Example 5: Record served on defense twenty-four or more days after sentence announcement; SJA's recommendation served on the defense three or more days after service of the record.

May 31 (Day 0): Sentence announcement.

June 24 (Day 24): Record served on defense.

June 27 (Day 27): SJA's recommendation served on the defense.

July 1 (Day 31): Deadline for defense response under R.C.M. 1105.

July 2 (Day 32): Deadline for defense response to SJA under R.C.M. 1106.

Comments: Because the record has been served on the accused more than twenty-three days after sentence announcement, the seven-day minimum period for review of the record will fall after the end of the normal thirty-day period for a submission under R.C.M. 1105.

The five-day period for responding to the SJA's recommendation under R.C.M. 1106 falls after the end of the thirty-day period for making a submission under R.C.M. 1105. Even if the defense fails to make a timely submission under R.C.M. 1105, the same matter can be submitted in the response to the SJA's recommendation under R.C.M. 1106.

The convening authority cannot act until the five-day period for the response under R.C.M. 1106 has expired, which is day 32 in the example, unless the defense expressly waives in writing the opportunity to respond.

Example 6: Record served on defense twenty-five or more days after sentence announcement; SJA's recommendation served on the defense two days after service of record.

May 31 (Day 0): Sentence announcement.

June 24 (Day 24): Record served on defense.

June 26 (Day 26): SJA's recommendation served on the defense.

July 1 (Day 31): Deadline both for the submission under R.C.M. 1105 and the response to the SJA's recommendation under R.C.M. 1106.

Comments: Because the record has been served on the accused more than twenty-three days after sentence announcement, the seven-day minimum period for review of the record will fall after the end of the normal thirty-day period for a submission under R.C.M. 1105.

The five-day period for responding to the SJA's recommendation under R.C.M. 1106 falls on the same day as the end of the period for making a submission under R.C.M. 1105.

The convening authority cannot act until both deadlines have expired, which is day 31 in the example, unless the defense expressly waives in writing both opportunities for submissions.

Example 7. Record served on defense twenty-four or more days after sentence announcement; SJA's recommendation served on the defense within one day after service of the record.

May 31 (Day 0): Sentence announcement.

June 24 (Day 24): Record served on defense.

June 25 (Day 25): SJA's recommendation served on the defense.

June 30 (Day 30): Deadline for response to SJA's recommendation under R.C.M. 1106.

July 1 (Day 31): Deadline for the submission under R.C.M. 1105.

Comments: Because the record has been served on the accused more than twenty-three days after sentence announcement, the seven-day minimum period for review of the record will fall after the end of the normal thirty-day period for a submission under R.C.M. 1105.

Under R.C.M. 1106, the defense has only five days after service of the SJA's recommendation in which to submit a response. However, under R.C.M. 1105, the accused has a minimum of seven days after service of the record in which to submit "any matter" to the convening authority. Even if the accused fails to make a timely response within five days after the SJA's recommendation, the defense has the full seven-day period in which to make a submission under R.C.M. 1105.

Because a response by the defense to the SJA's recommendation on or before day 30 does not automatically waive the right of the defense to make a submission under R.C.M. 1105 through day 31, the convening authority cannot take action until the deadline expires on day 31 unless the defense either expressly designates the earlier submission as being under both R.C.M. 1105 and 1106 or expressly waives the right to make a submission under R.C.M. 1105 and R.C.M. 1106.

Appendix C

Extension of Deadlines for Defense Submissions

The following sets forth the maximum extension of deadlines under R.C.M. 1105 and R.C.M. 1106 assuming that good cause for an extension has been established. In many cases, it many be expected that the accused will request less than the maximum; and the convening authority may grant an extension for less that the maximum number of days based on a determination that good cause for the maximum extension has not been established.

Example 8. Maximum extension of deadlines when: (1) the initial deadline under R.C.M. 1105 falls within forty days of sentence announcement; and (2) the initial deadline under R.C.M. 1106 falls within twenty-nine days after sentence announcement.

Example 8A.

May 31 (Day 0): Sentence announcement.

June 10 (Day 10): Record served on defense.

June 14 (Day 14): SJA recommendation served on defense.

June 19 (Day 19): Deadline for defense response to SJA recommendation under R.C.M. 1106.

June 30 (Day 30): Deadline for defense submission under R.C.M. 1105.

July 9 (Day 39): Maximum extension of defense deadline for response to the SJA under R.C.M. 1106.

July 20 (Day 50): Maximum extension of defense deadline for response to SJA's recommendation under R.C.M. 1105.

Comments: From the date of service of the SJA's recommendation (day 14), the defense has five days (until day 19) under R.C.M. 1106 in which to submit a response. Under that rule, this period may be extended for an additional twenty days (to day 39).

Because the record of trial was served on the accused within twenty-three days after sentence announcement, the defense has thirty days from sentence announcement in which to make a submission under R.C.M. 1105. *See* Appendix B, Example 2. Under R.C.M. 1105, the thirty-day period may be extended for an additional twenty days (to day 50).

Example 8B.

May 31 (Day 0): Sentence announcement.

June 24 (Day 24): Record served on defense.

June 24 (Day 24): SJA recommendation served on defense.

June 29 (Day 29): Deadline for defense response to SJA recommendation under R.C.M. 1106.

June 30 (Day 30): End of normal thirty-day period under R.C.M. 1105.

July 1 (Day 31): Deadline for defense submission under R.C.M. 1105.

July 19 (Day 49): Maximum extension of defense deadline for response to SJA under R.C.M. 1106.

July 20 (Day 50): Maximum extension of defense deadline for response to SJA's recommendation under R.C.M. 1105.

Comments: From the date of service of the SJA's recommendation (day 24), the defense has

five days (until day 29) under R.C.M. 1106 in which to submit a response. Under that rule, this period may be extended for an additional twenty days (to day 49).

Because the record of trial was served on the accused more than twenty-three days after sentence announcement, the seven-day period for review of the record falls outside the normal thirty-day period for making a submission under R.C.M. 1105. *See* Appendix B, Example 5.

Under R.C.M. 1105, the initial thirty-day period can be extended for an additional twenty days (to day 50).

Although R.C.M. 1105 also provides that the seven-day period to review the record can be extended for an additional ten days, the ten-day extension period is irrelevant when the seven day period ends within forty days after sentence announcement. This is because the ten day extension in such a case (from day 31 to day 41 in our example) would fall within the maximum twenty-day extension from the normal thirty-day period under R.C.M. 1105 (day 50 in our example).

These examples illustrate the following point of interest to the defense: if a lengthy extension is needed and the initial deadline for responding to the SJA's recommendation falls within twenty-two days of sentence announcement, the request for an extension should be made under R.C.M. 1105.

Example 9. Maximum extension of deadlines when the initial deadline under R.C.M. 1105 falls within forty days after sentence announcement and the initial deadline under R.C.M. 1106 falls thirty days after sentence announcement.

Example 9A.

May 31 (Day 0): Sentence announcement.

June 20 (Day 20): Record served on defense.

June 25 (Day 25): SJA recommendation served on defense.

June 30 (Day 30): Deadline for defense submission under R.C.M. 1105 and for defense response to SJA recommendation under R.C.M. 1106.

July 20 (Day 50): Maximum extension of defense deadlines for submission under R.C.M. 1105 and for response to SJA's recommendation under R.C.M. 1106.

Comments: From the date of service of the SJA's recommendation (day 25), the defense has five days (until day 30) under R.C.M. 1106 in which to submit a response. Under that rule, this period may be extended for an additional twenty days (to day 50).

Because the record of trial was served on the accused within twenty-three days after sentence announcement, the defense has thirty days from sentence announcement in which to make a submission under R.C.M. 1105. *See* Appendix B, Example 2. Under R.C.M. 1105, the thirty-day period may be extended for an additional twenty days (to day 50).

Example 9B.

May 31 (Day 0): Sentence announcement.

June 24 (Day 24): Record served on defense.

June 25 (Day 25): SJA recommendation served on defense.

June 30 (Day 30): End of normal deadline for submission under R.C.M. 1105.

June 30 (Day 30): Deadline for defense response to SJA recommendation under R.C.M. 1106.

July 1 (Day 31): Deadline for defense submission under R.C.M. 1105.

July 20 (Day 50): Maximum extension of defense deadline for response to the SJA under R.C.M. 1106.

July 20 (Day 50): Maximum extension of defense deadline for response to SJA's recommendation under R.C.M. 1105.

Comments: From the date of service of the SJA's recommendation (day 25), the defense has five days (until day 30) under R.C.M. 1106 in which to submit a response. Under that rule, this period may be extended for an additional twenty days (to day 50).

Because the record of trial was served on the accused more than twenty-three after days sentence announcement, the seven-day period for review of the record falls outside the normal

30-day period for making a submission under R.C.M. 1105. *See* Appendix B, Example 5.

Under R.C.M. 1105, the initial thirty-day period can be extended for an additional twenty days (to day 50).

Because the initial deadline under R.C.M. 1105 expires within forty days after sentence announcement, the maximum extension under R.C.M. 1105 will be to day 50. *See* Appendix C, Example 8B.

Example 10. Maximum extension of deadlines when: (1) the initial deadline under R.C.M. 1105 falls within forty days after sentence announcement and (2) the initial deadline for response to the SJA under R.C.M. 1106 falls thirty-one or more days after sentence announcement.

May 31 (Day 0): Sentence announcement.

June 30 (Day 30): End of normal period for submission under R.C.M. 1105.

July 2 (Day 32): Record served on defense.

July 5 (Day 35): SJA recommendation served on defense.

July 9 (Day 39): Deadline for defense submission under R.C.M. 1105.

July 10 (Day 40): Deadline for defense response to SJA recommendation under R.C.M. 1106.

July 20 (Day 50): Maximum extension of defense deadline for a submission under R.C.M. 1105.

July 30 (Day 60): Maximum extension of defense deadline for response to the SJA under R.C.M. 1106.

Comments: From the date of service of the SJA's recommendation (day 35), the defense has five days (until day 40) under R.C.M. 1106 in which to submit a response. Under that rule, this period may be extended for an additional twenty days (to day 60).

Because the record of trial was served on the accused more than twenty-three days after sentence announcement, the seven-day period for review of the record falls outside the normal thirty-day period for making a submission under R.C.M. 1105. *See* Appendix B, Example 5. Here, the record was served on day 32, so the defense has until day 39 to submit a response.

Under R.C.M. 1105, the initial thirty-day period can be extended for an additional twenty days (to day 50).

Because the initial deadline under R.C.M. 1105 expires within forty days after sentence announcement, the maximum extension under R.C.M. 1105 will be to day 50. *See* Appendix B, Example 8B.

Example 11. Maximum extension of deadlines when the initial deadline for a submission under R.C.M. 1105 ends forty-one or more days after sentence announcement.

Example 11A.

May 30 (Day 0): Sentence announcement.

July 5 (Day 35): Record served on defense.

July 8 (Day 40): SJA recommendation served on defense.

July 12 (Day 42): Deadline for defense submission under R.C.M. 1105.

July 13 (Day 43): Deadline for defense response to SJA recommendation under R.C.M. 1106.

July 22 (Day 52): Maximum extension of defense deadline for defense submission under R.C.M. 1105.

August 2 (Day 63): Maximum extension of defense deadline for response to SJA's recommendation under R.C.M. 1106.

Comments: Because the record of trial was served on the accused more than twenty-three days after sentence announcement, the seven-day period for review of the record falls outside the normal thirty-day period for making a submission under R.C.M. 1105. *See* Appendix B, Example 5. Here, the record was served on day 35, so the defense has until day forty-two to make a submission.

Under R.C.M. 1105, the initial thirty-day period can be extended for an additional twenty days (to day 50).

R.C.M. 1105 also provides that the minimum seven-day period for review of the record can be extended for a maximum of ten days.

Because the initial deadline under R.C.M. 1105 expires more than forty days after sentence announcement, the ten-day extension period will fall after day 50, the end of the normal extension period. Therefore, when the initial deadline under R.C.M. 1105 is on or after day 41 (because the record was served on the defense on or after day 34), the maximum extension is calculated by adding ten days to the initial deadline. In this example, the record was served on day 35, so the seven days to review the record provided an initial deadline of day 42. Under the ten-day rule, the maximum extension can be to day 52.

Under R.C.M. 1106, the defense has five days from service of the SJA's recommendation in which to submit a rebuttal. That deadline (day 43 in this example) can be extended for a maximum of twenty days (day 63 in this example).

From the defense perspective, the importance of this example is that when the deadline for a submission under R.C.M. 1105 is forty-one or more days after sentence announcement and a lengthy extension is required, a longer extension normally can be obtained under R.C.M. 1106. *But see* the following paragraph.

The guidance in the above paragraph does not apply when the SJA's review is served on the accused eight or more days before the record is served on the defense. *See* Examples 11B and 11C. Because the SJA must use the authenticated record in preparing the recommendation under R.C.M. 1106, it is not likely that the SJA's recommendation would be served on the accused prior to service of the record. The following examples illustrate the applicable deadlines and maximum periods of extension should such unusual timing occur:

Example 11B.

May 30 (Day 0): Sentence announcement.

June 27 (Day 27): SJA recommendation served on defense.

July 2 (Day 32): Deadline for defense response to SJA recommendation.

July 5 (Day 35): Record served on defense.

July 12 (Day 42): Deadline for defense submission under R.C.M. 1105.

July 22 (Day 52): Maximum extension of deadline under R.C.M. 1105.

July 22 (Day 52): Maximum extension of deadline under R.C.M. 1106.

Example 11C.

May 30 (Day 0): Sentence announcement.

June 26 (Day 26): SJA recommendation served on defense.

July 1 (Day 31): Deadline for defense response to SJA recommendation.

July 5 (Day 35): Record served on defense.

July 12 (Day 42): Deadline for defense submission under R.C.M. 1105.

July 21 (Day 51): Maximum extension of deadline under R.C.M. 1106.

July 22 (Day 52): Maximum extension of deadline under R.C.M. 1105.

Appendix D

Deadlines for Submissions Under R.C.M. 1105 in Non-BCD Special Courts-Martial and in Summary Courts-Martial

Example 12: Record served on defense within thirteen days after sentence announcement in a non-BCD special courts-martial.

May 31 (Day 0): Sentence announcement.

June 13 (Day 13): Record served on defense.

June 20 (Day 20): Deadline for defense submission under R.C.M. 1105.

June 30 (Day 30): Maximum extension of deadline under R.C.M. 1105.

Comments: Because the record has been served on the accused within thirteen days, the seven-day minimum period for review of the record will fall within the twenty-day period for a submission under R.C.M. 1105.

The maximum extension is calculated under R.C.M. 1105 by adding ten days to the end of the normal twenty-day period.

Example 13: Record served on defense fourteen

or more days after sentence announcement in a non-BCD special court-martial.

May 31 (Day 0): Sentence announcement.

June 14 (Day 14): Record served on defense.

June 21 (Day 21): Deadline for defense submission under R.C.M. 1105.

July 1 (Day 31): Maximum extension of deadline under R.C.M. 1105.

Comments: Because the record has been served on the accused more than thirteen days after sentence announcement, the seven-day minimum period for review of the record will fall after the end of the normal twenty-day period for a submission under R.C.M. 1105.

Because it was necessary to use the seven-day period to calculate the deadline, the maximum extension is calculated under R.C.M. 1105 by adding ten days to the end of the seven-day period.

Example 14. Summary courts-martial.

May 31 (Day 0): Sentence adjudication.

June 7 (Day 7): Deadline for submission under R.C.M. 1105.

June 17 (Day 7): Maximum extension of deadline under R.C.M. 1105.

Comments: Under R.C.M. 1105, the accused has seven days from sentence announcement in which to make a submission. The deadline may be extended for a maximum of ten days.

Canine Narcotics Detection in the Military A Continuing Bone of Contention?

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The military services have long emphasized using drug detection dogs in methods and situations that will ensure the admissibility of any evidence located. The Court of Military Appeals has generally concluded that a drug detection dog's sniff is not, in itself, a search.[1] The circumstances in which the dogs have been used, however, have given rise to a significant amount of litigation. Over the past decade, decisions of the Court of Military Appeals and the courts of military review, and the Military Rules of Evidence, have provided fairly definite boundaries within which unit commanders currently use detection dogs.[2]

Guidance From the Supreme Court: *United States v. Place*

Recently, in *United States v. Place*,[3] the United States Supreme Court directly addressed for the first time the lengthy legality of using drug detection dogs.[4] In an option devoted primarily to the issue of whether a lengthy deten-

[1] *See, e.g.*, United States v. Middleton, 10 M.J. 123 (C.M.A. 1981); United States v. Grosskreutz, 5 M.J. 344 (C.M.A. 1978). Of the recent members of the Court of Military Appeals, only Judge Ferguson held a contrary position. In his concurrence in United States v. Thomas, Judge Ferguson stated that he was "of the opinion that the use of a dog, trained to ferret out the presence of contraband drugs... constitutes a 'search' within the definition of the Fourth Amendment...." 1 M.J. 397, 405 (C.M.A. 1976) (Ferguson, J., concurring). *See also* Kingham, *Marijuana Dogs as an Instrument of Search: The Real Question*, The Army Lawyer, May 1973, at 11.

[2] *See, e.g.*, United States v. Middleton, 10 M.J. 123 (C.M.A. 1981) (use of canines during health and welfare inspection approved); United States v. Grosskreutz, 5 M.J. 344 (C.M.A. 1978) (use of canine to verify informant's tip approved); United States v. Rivera, 4 M.J. 215 (C.M.A. 1978) (use of canines to check vehicles and persons entering military installations overseas approved); United States v. Unrue, 22 C.M.A. 466, 47 C.M.R. 556 (1973) (use of canines at on-post checkpoint approved).

[3] 103 S.Ct. 2637 (1983).

[4] The Supreme Court obliquely approved the use of drug detection dogs without probable cause and a search warrant in United States v. Chadwick, 433 U.S. 1 (1977). Although the issue in *Chadwick* was whether a warrant was necessary before luggage could be opened and searched, the Court did not question use of the detection dog to indicate the presence of illegal drugs in the luggage.

tion of theluggage of a suspected drug courier was permissible under the *Terry v. Ohio* "reasonable suspicion" test, the Court also commented summarily on the use of dogs in law enforcement activities.[5] Although the issue was neither contested at trial nor briefed or argued to the Supreme Court,[6] the Court stated that canine sniffing of luggage in an airport, a public place, is not a fourth amendment search.[7] The Court did not attempt to fit the drug detection dog into one of the categories of exceptions to the fourth amendment warrant requirement.[8] Instead, it declared a dog's sniff to be *sui generis*.[9] In placing the drug detection dog's sniff outside the definition of a search, the Court noted that "no other investigative procedure...is so limited both in the manner in which information is obtained and in the content of the information revealed by the procedure."[10]

Caution should be exercised in interpreting or predicting the consequences of *United States v. Place*. With its seemingly broad scope, the *Place* treatment of drug detection dogs may undergo judicial finetuning in the future. Several legal scholars, as well as the Ninth Circuit Court of Appeals, specifically argue for limitations on the use of drug detection dogs. The Ninth Circuit will soon decide the application of *Place* in *United States v. Beale*. In *Beale*, the Ninth Circuit held that canine detection of narcotics in suitcases checked at an airport is an intrusion under the fourth amendment.[11] In view of the minimally intrusive nature of a dog's sniff, however, the court dispensed with the probable cause and warrant requirements, replacing them with a requirement that the search be based on reasonable suspicion. The Supreme Court vacated the judgment after its decision in *Place*.[12] In the initial rehearing,[13] the Ninth Circuit determined that some degree of reasonable suspicion is necessary before a drug detection dog may be used. They distinguished *Place* by noting that the Supreme Court had already concluded that reasonable suspicion existed for detaining the defendant's luggage.[14] Therefore, the Court's statement in *Place* that use of the dog did not constitute a search meant only that additional suspicion beyond that necessary for detention of the luggage was not required. An *en banc* rehearing in *Beale* has been ordered by the Ninth Circuit and it remains to be seen how they will finally interpret *Place*.[15]

Similarly, Professor Wayne R. LaFave decried as "outrageous" a state appellate court deci-

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[5]392 U.S. 1, 31 (1968). In *Terry*, the Supreme Court concluded that a police stop and frisk of a person reasonably thought to be dangerous is a search. The Court, however, did not require that the frisk be made with a warrant based on probable cause. Instead, because a frisk is minimally intrusive and aids police protection, the Court required only reasonable suspicion.

[6]*Place*, 103 S.Ct. at 2651 (Brennan, J., concurring). Justice Brennan argued that the issue was not before the Court and should not be decided.

[7]U.S. Const. amend. IV; *Place*, 103 S.Ct. at 2644-45.

[8]Classifying the sniff of a drug detection dog for fourth amendment analysis has proved to be elusive and troublesome. The Supreme Court's decision in United States v. Katz, 389 U.S. 347 (1967), has been particularly difficult for lower courts to apply to the myriad fact situations that occur in search and seizure cases. The need for a *Katz* analysis is obviated, however, if an exception to the warrant requirement can be found. Plain view (or more accurately, smell) is most often posited by law enforcement officials as justification for admitting evidence of illegal drugs located by canines. These plain smell/view situations are of the "open fields" variety upheld in Hester v. United States, 265 U.S. 57 (1924). A second variety of plain view, articulated in Coolidge v. New Hampshire, 403 U.S. 443 (1971), is inapplicable. *Coolidge* situations are those "in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character." *Id.* at 465. The plain smell rationale gives rise to debate over whether the intrusiveness of a dog's sniff more closely resembles that of flashlights (United States v. Hood, 493 F.2d 667 (9th Cir. 1974)) and binoculars (United States v. Minton, 488 F.2d 37 (4th Cir. 1973)), which are permissible, or the intrusiveness of electronic surveillance (*Katz*) and magnetometers (United States v. Epperson, 454 F.2d 769 (4th Cir. 1972)), which are not.

[9]*Place*, 103 S.Ct. at 2644.

[10]*Id.*

[11]647 F.2d 1327 (9th Cir. 1982), *vacated*, 103 S.Ct. 3529 (1983).

[12]*See also* United States v. West, 651 F.2d 71 (1st Cir. 1981), *vacated*, 103 S.Ct. 3528 (1983).

[13]52 U.S.L.W. 2280 (9th Cir. Nov. 22, 1983).

[14]*Beale*, 52 U.S.L.W. at 2280.

[15]728 F.2d 411 (9th Cir. 1984).

sion that upheld the use of drug dogs to conduct "dragnet" patrolling.[16] The court admitted evidence obtained from routine checks of a Greyhound package express area by a drug detection dog whose handler had no suspicion whatsoever that drugs were present.[17] While another scholar recognizes that a dog's sniff is not highly intrusive, he argues that luggage cases "deserve an acknowledgement that a limited but legitimate privacy interest exists."[18] In other words, although the minimally intrusive nature of the canine sniff is an important consideration, an intrusion occurs nonetheless. The argument, therefore, is that courts must recognize that canine drug detection should be subject to fourth amendment constraints *before* it begins. Some level of suspicion must usually precede use of the dogs. The minimal instrusiveness would then be a mitigating factor when the courts decide whether a warrant is required. This approach compels courts to apply the analysis in *United States v. Katz*,[19] rather than dispense with it by a preemptory conclusion that a canine sniff is not a search. As described in a concurring opinion in *Katz*, fourth amendment protection accrues to those who can establish "they exhibited an actual (subjective) expectation of privacy [and that their expectation was] one that society is prepared to recognize as 'reasonable.' "[20]

From the standpoint of military preparedness and discipline, any future required restraint in the use of drug dogs does not propose serious impediments to current drug detection techniques. Rather, this restraint will require a suspicion of a lesser degree than probable cause, similar to the *Terry* "reasonable suspicion" standard. In many cases involving drug detection dogs, authorities had some degree of suspicion that drugs were present before the dogs were used.[21] The detection dogs were not sent out on dragnet-type expeditions.

Military Applications of Canine Narcotics Detection

The impact of *United States v. Place* on drug detection in the military services has yet to be seen. An overlay of the *Place* reasoning and the efforts to distinguish it in typical situations giving rise to the military use of drug detection dogs, however, is instructive.

Military Barracks and Dormitories

For fourth amendment purposes, military barracks and dormitories can generally be considered as containing two types of areas: common areas, and private areas in which occupants sleep and have personal possessions. Use of drug detection dogs in common areas, *e.g.*, hallways, stairwells, latrines, open bays and laundry rooms, of buildings has been consistently upheld by the military courts.[22] Occupants have no reasonable expectation of privacy

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[16]1 W. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 2.2(f) (Supp. 1982) (discussing State v. Wolohan, 23 Wash. App. 813, 598 P.2d 421 (1979)). *See also* State v. Morrow, 128 Ariz. 309, 625 P.2d 898 (1981) (if a dog's sniff is not a search, then prior suspicion need not precede its use).

[17]State v. Wolohan, 23 Wash. App. 813, 815, 598 P.2d 421, 424-25 (1979).

[18]Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on* Katz *and Dogs*, 11 Ga. L. Rev. 75, 101 (1976).

[19]389 U.S. 347 (1967).

[20]*Id.* at 361 (Harlan, J., concurring). Analysis of the intrusiveness is associated with the second factor in *Katz*: was a reasonable expectation of privacy violated? Discussion of intrusiveness, therefore, may be an implicit acknowledgement by many courts that a search of some sort has in fact occurred and must be reconciled with the fourth amendment.

[21]*See* United States v. Beale, 674 F.2d 1330 (9th Cir. 1982), *vacated*, 103 S.Ct. 3529 (1983), *rehearing ordered*, 728 F.2d 411 (9th Cir. 1984) (reasonable suspicion); United States v. Klein, 626 F.2d 22 (7th Cir. 1980) (reasonable suspicion); United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980) (precedent information and observations); United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975) (reliable information); United States v. Grosskreutz, 5 M.J. 344 (C.M.A. 1978) (informant's tip); United States v. Guillen, 14 M.J. 518 (A.F.C.M.R. 1982) (information from questionable informant); United States v. Boisvert, 1 M.J. 317 (A.F.C.M.R. 1976) (inadequate tip from informant); United States v. Black, 50 C.M.R. 15 (N.C.M.R. 1974) (informant's tip).

[22]*See, e.g.*, United States v. Thomas, 1 M.J. 397 (C.M.A. 1976); United States v. Guillen, 14 M.J. 518 (A.F.C.M.R. 1982); United States v. Paulson, 2 M.J. 326 (A.F.C.M.R. 1976).

in these areas.[23] The *Place* opinion does not change this conclusion because without a reasonble expectation of privacy, any analysis of the intrusiveness of the dog's sniff is rendered unnecessary.

Individual living areas and lockers present more difficult situations. Occupants have a legitimate expectation of privacy in these areas.[24] Until the promulgation of the Military Rules of Evidence (M.R.E.), health and welfare inspections and shakedown searches usually received distinctly different treatment.[25] Currently, however, evidence from both may be admitted under M.R.E. 313(b).[26] The longstanding notion that a health and welfare inspection must be a "traditional military inspection which looks at the overall fitness of a unit to perform its mission"[27] continues to find approval in the rule.[28] More importantly, M.R.E. 313(b) also condones the use of "shakedown" inspections. In the past, these were inspections whose main purpose was to discover contraband. They were often condemned as "general exploratory searches and, with or without a warrant,...forbidden as unreasonable."[29] Today, however, M.R.E. 313(b) allows admission of evidence gathered during these activities when certain predicate conditions are met:

> An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband when such property would affect adversely the security, military fitness, or good order and discipline of the command and when (1) there

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[23]In *Guillen*, a handler of a drug detection dog walked the dog on a common sidewalk outside the accused's door in an on-base family housing area. The court determined that the accused had no reasonable expectation of privacy in the sidewalk area. Similarly, in *Paulson*, a detection dog, being walked down the hallway of a barracks, alerted at the door to the accused's room. The court found no "precedent in the military that extends a barracks room occupant's reasonable expectation of privacy to smells emanating into such areas." 2 M.J. at 330. If a service member has no expectation of privacy in a common area such as a barracks hallway or a sidewalk, no level of probable cause or suspicion is necessary before the area is exposed to a drug detection dog. *See* Lederer & Lederer, *Admissibility of Evidence Found by Marijuana Detection Dogs*, The Army Lawyer, Apr. 1973, at 12.

[24]*See, e.g.*, United States v. Middleton, 10 M.J. 123 (C.M.A. 1981); United States v. Roberts, 2 M.J. 31 (C.M.A. 1976); United States v. Thomas, 1 M.J. 397 (C.M.A. 1976); United States v. Black, 50 C.M.R. 15 (N.C.M.R. 1974).

[25]*See, e.g.*, United States v. Middleton, 10 M.J. 123 (C.M.A. 1981) (use of drug detection dog during traditional health and welfare inspection); United States v. Roberts, 2 M.J. 31 (C.M.A. 1976) (use of drug detection dog during pre-Military Rules of Evidence shakedown inspection). Although *Middleton* was a post-M.R.E. decision, the court did not decide the legality of M.R.E. 313(b). Instead, evidence from the activity in question was admitted as the fruit of a health and welfare inspection.

[26]Manual for Courts-Martial, United States, 1969 (rev. ed.) Military Rule of Evidence 313(b) [hereinafter cited as M.R.E.].

[27]*Roberts*, 2 M.J. at 36. In *Middleton*, 10 M.J. at 127 n.7, the court noted with approval the definition of a traditional military inspection set out by the Army Court of Military Review:

> A military inspection is an examination or review of the person, property, and equipment of a soldier, the barracks in which he lives, the place where he works, and the material for which he is responsible. An inspection may relate to readiness, security, living conditions, personal appearance, or a combination of these and other categories. Its purpose may be to examine the clothing and appearance of individuals, the presence and condition of equipment, the repair and cleanliness of barracks and work areas, and the security of an area or unit. Except for the ceremonial aspect, its basis is military necessity.
>
> Among the attributes of an inspection are: that it is regularly performed; often announced in advance; usually conducted during normal duty hours; personnel of the unit are treated evenhandedly; and there is no underlying law enforcement purpose. An inspection is distinguished from a generalized search of a unit or geographical area based upon probable cause in that the latter usually arises from some known or suspected criminal conduct and usually has a law enforcement as well as a possible legitimate inspection purpose.

United States v. Hay, 3 M.J. 654, 655-56 (A.C.M.R. 1977).

[28]In part, M.R.E. 313(b) states that "[a]n 'inspection' is an examination of the whole or part of a unit...conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit...."

[29]*Roberts*, 2 M.J. at 32 (citing United States v. Rabinowitz, 339 U.S. 56 (1950) and Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931)).

is a reasonable suspicion that such property is present in the command or (2) the examination is a previously scheduled examination of the command.[30]

In other words, inspections conducted with some intent to discover contraband are permissible, but they must follow the specific requirements set out in M.R.E. 313(b).[31] These requirements are not particularly burdensome, especially if the contraband is of a type generally recognized as a threat to security, fitness, or order and discipline. Assuming the contraband has one or more of these harmful qualities, if the inspection is based on reasonable suspicion, only a minimum level of suspicion is necessary. If the inspection is a scheduled inspection, it must be planned sufficiently in advance to eliminate the possibility of being used as a "subterfuge" when probable cause is absent.[32] Finally, M.R.E. 313(b) states that "an examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceeding is not an inspection. . . ."[33] Instead, it is a prosecutorial search, and probable cause is required. The drafters of the Military Rules of Evidence acknowledged, however, that evidence gathering could be a secondary purpose, with the primary thrust of these inspections directed toward maintaining the health and safety conditions of units.[34]

The drafters specifically noted that drug detection dogs are encompassed by the language of M.R.E. 313(b), which permits the use of "any reasonable or natural technological aid."[35] Since the central purpose of using drug detection dogs is to discover contraband, their use must be controlled in accordance with the contraband inspection requirements described above. If an inspection using drug detection dogs is not a scheduled inspection, then reasonable suspicion must first be present. In any event, use of dogs to gather evidence *primarily* for purposes of courts-martial is prohibited by M.R.E. 313(b), absent probable cause. Although the drafters expressly anticipated the use of dogs in inspections and inspections for the purpose of locating contraband, they did not provide specific guidance as to the scope of these investigations.[36] In *United States v. Middleton*,[37] however, the Court of Military Appeals upheld the admission of evidence obtained when a detection dog that was physically within the designated scope of an inspection located contraband outside the inspection area.[38] Based on the expansive nature of the rules of evidence in this area and existing case law, the result should be no different under M.R.E. 313(b). Additionally, the M.R.E. drafters noted that "the technique of inspection is generally unimportant under the new rules."[39] This comment, however, may have been a reference to the drug detection dog as an available technique and not to the reasonableness of methods of actually utilizing it.

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[30]M.R.E. 313(b). A revision of the Manual for Courts-Martial, effective 1 Aug. 1984, will modify the requirements of M.R.E. 313(b) for contraband inspections. *See* 48 Fed. 23,688 (1983). The requirements for adverse effect and either reasonable suspicion or prior scheduling will be eliminated. The test will instead focus on whether the inspection was primarily administrative in nature. This change may prove to be the source of considerable discussion and litigation. Specifically, deletion of the requirement that an inspection be scheduled or be preceded by reasonable suspicion will make the commander's purpose in conducting the inspection determinative. Whether the Supreme Court and the Court of Military Appeals will give their approval to inspections conducted in accordance with these guidelines is debatable. Concededly, this development may very well be consistent with an expansive reading of *Place* that would render prior suspicion unnecessary when detection dogs are used to locate narcotics. Without further guidance from the Supreme Court, however, adherence to *current* procedures in M.R.E. 313(b) should leave commanders on firm constitutional ground when using evidence that is acquired during inspections.

[31]M.R.E. 313(b), Analysis of the 1980 Amendments to the Manual for Courts-Martial [hereinafter cited as Analysis].

[32]*Id.*

[33]M.R.E. 313(b).

[34]M.R.E. 313(b), Analysis.

[35]*Id.*

[36]M.R.E. 313(b).

[37]10 M.J. 123 (C.M.A. 1981) (a pre-M.R.E. case).

[38]*Id.* at 129. When the dog alerts on an area outside the scope of the inspection, prior authorization should be obtained to support the intrusion into that area.

[39]M.R.E. 313(b), Analysis.

Arguably, M.R.E. 313(b) provides more safeguards in this aspect of search and seizure than did the Supreme Court in *United States v. Place.* If a non-scheduled inspection is for the purpose of locating contraband that is detrimental to a unit's mission readiness, then M.R.E. 313(b) requires that some degree of preliminary suspicion precede the use of drug detection dogs. *Place*, on the other hand, can be interpreted as dispensing with any preliminary suspicion because the intrusion involved is minimal. M.R.E. 313(b), therefore, provides greater safeguards in this area, and corresponds to the Ninth Circuit's decision to require reasonable suspicion before using detection dogs in *United States v. Beale.* Without further guidance from the Supreme Court, adherence to current procedures in M.R.E. 313(b) should leave commanders on firm constitutional ground when using evidence acquired during barracks inspection for disciplinary proceedings.

Gates and Checkpoints

Entrances to Installations Overseas

Procedures for using drug detection dogs at the entrance to military installations vary according to geographical location. In *United States v. Rivera*[40] the Court of Military Appeals approved random searches, including the use of dogs to assist in the searching, at entry points onto American military installations in foreign countries. The court analogized this situation to "the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into the country...."[41] It concluded that the need to maintain security and halt drug traffic, when combined with reasonable search procedures, justified the random stops.[42]

The decision in *Rivera* has been codified in M.R.E. 314(c), which authorizes "a commander of a United States military installation...on foreign soil...to search persons or the property of such persons upon entry to the installation...."[43] The additional requirements placed on inspections for contraband by M.R.E. 313(b) are not present in M.R.E. 314(c). Instead, because the border search doctrine applies, the search need only be reasonable and "primarily prophylactic."[44] In keeping with the basic intent of this doctrine to prohibit entry of contraband, searches that are instead "made for the primary purpose of obtaining evidence for use in a trial by court-martial" are not authorized.[45]

Because the rationale of *Rivera* and M.R.E. 314(c) hinges on the border crossing exception to the probable cause and warrant requirements of the fourth amendment, the intrusiveness considerations raised in *Place* should have little effect on these situations. A drug detection dog is a reasonable means of examining travelers.[46] As long as the analogy to international borders remains valid, the relative intrusiveness of a detection dog is unimportant.

Entrances to Installations in the United States

Use of drug detection dogs at the entrances to military installations in the United States and its territories is subject to the restrictions found in M.R.E. 313(b). Because the dogs are used to locate contraband in vehicles entering installations, gate inspections must either be scheduled beforehand or be based on reasonable suspicion. Since reasonable suspicion will rarely occur, these inspections will normally be previously scheduled. The drafters of M.R.E. 313(b) contemplated leaving some discretion to the inspectors themselves in selecting vehicles and individuals for inspection.[47] This is a change from prevailing case law and, to date, the per-

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[40]4 M.J. 215 (C.M.A. 1978).

[41]*Id.* at 216 (paraphrasing United States v. Ramsey, 431 U.S. 606, 616-18 (1977)).

[42]*Rivera*, 4 M.J. at 217-18.

[43]M.R.E. 314(c). A pending change to M.R.E. 314(c) will sanction such border type searches upon both entry and exit. *See* United States v. Alleyne, 13 M.J. 331 (C.M.A. 1982).

[44]M.R.E. 314(c), Analysis.

[45]M.R.E. 314(c).

[46]*See infra* note 74.

[47]M.R.E. 313(b), Analysis. The drafters of the rule, however, did intend that gate inspectors' discretion be limited. They noted that without reasonable suspicion, these inspections must be scheduled and must not violate the equal protection clause or be used as a subterfuge to search certain individuals.

missible amount of discretion in making these selections has not been established.

In the past, absent probable cause, gate inspections were conducted in a prearranged sequence, leaving little discretion to the inspectors.[48] The Court of Military Appeals has demonstrated its reluctance to allow admission of evidence from inspections of uncertain scope. In *United States v. Hayes*[49] it held that admissability of evidence obtained from a barracks security inspection system was not supported by the record. Among the factors it considered, the court found it significant that the record of trial contained no regulations or policy letters governing the conduct of the security inspections. Moreover, it noted that the sergeant conducting the inspection had "some leeway for arbitrariness...as to when and how extensively" he could inspect.[50] Similarly, in *Bonovan v. Dewey*,[51] the Supreme Court emphasized that the "frequency and purpose of inspections [were not left] to the unchecked discretion of Government officers" when it upheld warrantless inspection procedures required by federal mine safety legislation.[52] Additionally, the autonomy M.R.E. 313(b) gives the handlers of military drug detection dogs at entrances to installations apparently exceeds the discretion of the handlers in *Place*. The defendant and the luggage in *Place* had previously been identified. The handler directed his dog to sniff the defendant's luggage for the specific reason that the presence of contraband was suspected. Whether *Place* and similar cases will serve as judicial limitations on the applicability of M.R.E. 313(b) to gate inspections is unknown. Some additional restraints on inspectors' discretion beyond the language of M.R.E. 313(b) may be warranted in light of these cases.[53]

Checkpoints Within Installations

The Court of Military Appeals has approved the reasonable use of detection dogs at checkpoints within a military installation. In *United States v. Unrue*,[54] the Commander, 197th Infantry Brigade, Ft. Benning sealed off the portion of the post occupied by his unit. Two checkpoints were established at the entrance to this area; both checkpoints were within the confines of Ft. Benning. An amnestry barrel was placed at the first checkpoint for those who wished to discard contraband without incurring sanctions. A sign warned: "Attention, narcotics check, with narcotic dogs. Drop all drugs here and no questions asked. Last Chance." Thirty feet down the road was a second checkpoint. The handler of the drug detection dog that was present at the second checkpoint was instructed to walk his dog around the accused's vehicle to determine whether "cause" to searched existed. The Court of Military Appeals concluded that the checkpoints were reasonable in view of military necessity.[55] Keeping drugs out of the command was sufficient justification. The procedures involving the detection dog at the checkpoints were likewise approved. The court held that "use of the dog to detect odors from the vehicle...was not unreasonable."[56] The occupants had notice that they were subject to inspection and were first given an opportunity to dispose of contraband. "By the time the vehi-

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[48]*See, e.g.*, United States v. Bowles, 7 M.J. 735, 736 (A.F.C.M.R. 1979) (security police were instructed to inspect every fifth vehicle entering or leaving an air base).

[49]11 M.J. 249 (C.M.A. 1981).

[50]*Id.* at 251.

[51]425 U.S. 594 (1981).

[52]*Id.* at 604. *See also* United States v. Biswell, 406 U.S. 311 (1972).

[53]*See supra* note 31 concerning the proposed revision to M.R.E. 313(b). The revision will affect inspection procedures during entrance gate inspections as well. Without the requirement that inspections for contraband be scheduled or be based on reasonable suspicion, the amount of discretion left to the inspectors will be all the more crucial. The likelihood that the command is using the inspections as a subterfuge for prosecutorial purposes, however, would be less than in the barracks context. A commander cannot ordinarily anticipate the opportunity to find particular individuals in the possession of contraband during entrance gate inspections to the same extent he or she can during a barracks inspection.

[54]22 C.M.A. 466, 47 C.M.R. 556 (C.M.A. 1973).

[55]*Id.* at 470, 470 C.M.R. at 560.

[56]*Id.*

cle reached the second checkpoint, the justifiable expectation of privacy as to odor emanating from it was just 'not of impressive dimensions.' "[57] The court characterized the procedures as a "regulatory program" designed to protect the "morale, capability, and health" of the command rather than as "a search to protect the security of the command."[58]

M.R.E. 313(b) acts to codify the result in *Unrue*.[59] Again, because drug detection dogs are used, the specific requirements for inspections designed to locate contraband must be followed.[60] The factual situation in *Unrue* falls under the "scheduled inspection" prong of M.R.E. 313(b), since reasonable suspicion did not exist. Whether the inspectors at a checkpoint *within* a military installation may exercise discretion in selecting vehicles for inspection is open to question. The M.R.E. drafters mentioned only entrance gate inspections in their discussion of discretion.[61] In view of the carefully controlled setting in *Unrue*, in which all individuals were given advance notice of the inspection and then stopped, withholding discretion from the inspection personnel appears to best provide the requisite fourth amendment protection. The inspection thereby remains an administrative proceeding, without the overtones of the search and seizure issues that are generated when inspectors are left to their own devices in deciding who and what to inspect. The *Place* decision should not affect the *Unrue* result in these situations if proper procedures are followed. In this respect, as in entrance gate inspections overseas, the intrusiveness of canines is immaterial.

Housing Areas

The military courts have approved procedures for canine sniffing in military housing areas when use of the detection dogs is based on reasonable suspicion. Two recent cases decided by the Air Force Court of Military Review are illustrative. In *United States v. Peters*[62] the accused was stopped during a random gate inspection. Suspected marijuana was found in the accused's glove compartment and on the person of his wife. Without further information, the handler of a drug detection dog took it through the yard of the accused's quarters and directed the dog to sniff all the windows and doors of his home. As its front paws rested on a window sill, the dog alerted. The court concluded a search had taken place. Furthermore, because the search was not preceded by "specific and articulable facts leading to a reasonable suspicion as to the presence of contraband in the quarters," the court held that the search violated the fourth amendment.[63]

In *United States v. Guillen*[64] authorities received a tip of questionable reliability from an informant that the accused had a quantity of marijuana at his on-post quarters. A handler and his drug detection dog were dispatched to the family housing area. In contrast to the *Peters* case, however, the handler in *Guillen* kept his dog on the sidewalk that led to the doors of the various quarters in the housing area. The dog alerted at the door to the accused's quarters. A search warrant was then obtained and the quarters were searched. In upholding the admission of evidence discovered during the ensuing search, the court noted that the dog had been in a common area, a sidewalk, when it alerted. "The dog's alert at the door to the accused's quarters did not violate any expectation of privacy recognized by the Fourth Amendment...."[65]

Unless *United States v. Place* is interpreted as allowing general dragnet-type activities, it

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[57] *Id.* (quoting United States v. Biswell, 406 U.S. 311, 317 (1972)).

[58] *Id.* at 469-70, 47 C.M.R. at 559-60. *Unrue* also gave rise to considerable debate over whether a dog's sniff is itself a search. The regulatory nature of the checkpoints in the case left to conjecture the question of whether the use of detection dogs in other circumstances would be permitted. *See* Kingham, *supra* note 1, at 11; Lederer, *supra* note 24, at 12.

[59] M.R.E. 313(b), Analysis.

[60] The proposed revision to the Manual for Courts-Martial will delete a number of these requirements. *See supra* notes 31 and 54.

[61] M.R.E. 313(b), Analysis.

[62] 11 M.J. 901 (A.F.C.M.R. 1981).

[63] *Id.* at 904.

[64] 14 M.J. 518 (A.F.C.M.R. 1982).

[65] *Id.* at 521.

should not affect the results of cases similar to either *Peters* or *Guillen*. *Peters* was essentially a dragnet search case. Not even a reasonable suspicion was present before the detection dog was dispatched to the quarters and allowed to sniff the windows and doors. Accordingly, the fruits of the search were excluded. In *Guillen*, on the other hand, the authorities had some suspicion that drugs were present. Additionally, rather than release the dog to roam the perimeter of the house, the handler kept it in an area readily accessible to the public, thereby avoiding an unreasonable intrusion.

Some Additional Considerations

Establishing Reliability

Once the command decides to use a drug detection dog, several addition procedural steps are necessary to ensure the ultimate admissibility of any evidence located. The most crucial of these is the requirement that the dog's reliability be established.[66] The animal must have an acceptable track record of indicating the presence of drugs. False alerts lower the reliability and usefulness of the dog. Moreover, a poor track record may affect the reasonableness of a particular animal as an aid during an inspection.[67]

Discussion of reliability usually occurs at two junctures in the search process. The first is before the dog is exposed to the area in question. Commanders and other officials who direct the use of detection dogs are usually apprised of the dog's reliability beforehand. The second and most critical point at which reliability is discussed occurs after the dog has completed its sniffing mission. At this time, authorization to search is sought. The person authorizing the search must be informed of the dog's reliability.[68] The same person, however, should not directly participate in the initial use of the dogs and then authorize the follow-up search as well. In *United States v. Ezell* the Court of Military Appeals held that "obtaining information to be used as the basis for requesting authorization to search is a law-enforcement function and involvement in that information-gathering process would disqualify the commander from authorizing the search."[69] The drafters of the Military Rules of Evidence codified *Ezell* in M.R.E. 315(d), but noted that an *impartial* commander could authorize use of a drug detection dog and then later issue a search authorization.[70] Yet, even though the commander who directs the efforts of the detection dog is familiar with its past reliability, this knowledge alone may not be a sufficient basis for giving permission to search. On the other hand, if the commander actively participated in the use of the dog, a neutral official must authorize the search, and, in the process, become acquainted with the dog's capabilities and past reliability, and the particular alert in issue.

Describing an Alert

Although a description of how the dog alerted (peculiar behavior or response), would seem appropriate for a magistrate's consideration, this information has not received emphasis in the military courts. In fact, in *United States v.*

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[66]*See, e.g.*, United States v. Unrue, 22 C.M.A. 466, 468, 47 C.M.R. 556, 558 (C.M.A. 1973) (commander had witnessed earlier demonstrations of dog's reliability).

[67]M.R.E. 313(b).

[68]*See, e.g.*, United States v. Grosskreutz, 5 M.J. 344 (C.M.A. 1978) (base commander who authorized search was informed of dog's reliability every 90 days); United States v. Paulson, 2 M.J. 326 (A.F.C.M.R. 1976) (authorizing official knew of dog's reliability from its track record); United States v. Boisvert, 1 M.J. 317 (A.F.C.M.R. 1976) (authorizing official was personally familiar with dog's ability). *Contra* United States v. Black, 50 C.M.R. 15 (N.C.M.R. 1975) (drug detection dogs are so widely used that their reliability should be accepted as a matter of common knowledge). Unfortunately, the Supreme Court shed little light on this matter in *Place*. The court simply described the canine involved as "well-trained," without indicating whether the magistrate who issued the search warrant was aware of either its training or its reliability. 103 S.Ct. at 2644.

[69]6 M.J. 306, 319 (C.M.A. 1979). *See, e.g.*, United States v. Murray, 12 M.J. 139 (C.M.A. 1981) (commander disqualified to authorize search because he personally engaged in the investigation leading up to it).

[70]M.R.E. 315(d), Analysis.

Paulson[71] the Air Force Court of Military Review specifically declined to require such a description. It found that failure to describe a canine's alert to the commander authorizing the search was not a material omission.[72] It adopted the trial judge's conclusion that because the handler and the dog worked as a team, the handler's affirmative statement to the commander was sufficient. Through training and experience, the handler had come to recognize his dog's characteristic alert; therefore, the handler was best prepared to interpret his dog's reaction and determine if it was a "true" alert. "To describe [the dog's] actions to the commander would have served no more useful purpose than quoting a Chinese informant to a magistrate not conversant in the Chinese language."[73] The handler simply acted as an interpreter in relaying his dog's response to the commander.

Inspecting/Searching the Individual Soldier

Army regulations prohibit the use of drug detection dogs "to search the persons of individuals."[74] Authorities are directed to exercise "extreme caution" to ensure that this prohibition is observed.[75] The choice of words in the regulation is a potential source of confusion. If the canine sniff is not a search, then arguably the use of a dog to inspect individuals during administrative intrusions such as health and welfare inspections would be permissible. *United States v. Place* could possibly be used to enforce this position if it truly stands for the proposition that canine drug detection activities are not fourth amendment intrusions.

From a pragmatic view, however, the regulation acts to prohibit exposing the persons of soldiers to canine drug detection under *all* circumstances. This view received support from Justice Brennan in his concurrence in *Place*. He emphasized that even if canine sniffs of "inanimate objects" are not searches, sniffs of people are.[76]

On occasion, the persons of service members have been subjected to sniffs by drug detection dogs, whether inadvertently or by design. In *United States v. Rivera*,[77] an airman was sniffed by a detection dog after he was instructed to get out of his car at the entrance to an installation on foreign soil.[78] The central issue in the case concerned the procedure that resulted in the accused being stopped at the gate to the installation. The heroin located during the stop, including the amount the dog detected on the accused's person, was admitted.[79] On appeal, the accused did not raise the issue of the dog's sniff of his person, nor did the Court of Military Appeals address it. The case may not be persuasive in other situations, however, because the court took express notice of the military necessity for careful control of entrances to oversea installations. In a barracks situation, however, the Air Force Court of Military Review upheld the admission of marijuana that was discovered on the accused's person by a drug detection dog.[80] In a footnote, the court pointed out that the defendant was in a common area, a hallway, when the dog alerted.[81] It concluded that the subsequent search, made on the authority of the base commander, was permissible.[82]

Based on these cases, the prevailing view of the Military courts seems to be that drug detection through canine sniffing of the persons of individuals is not an unreasonable fourth amendment intrusion. The policy of the Department of the Army in prohibiting these activities, however, is in accordance with a strong

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[71]2 M.J. 326 (A.F.C.M.R. 1976).

[72]*Id.* at 330.

[73]*Id.* at 330 n.5.

[74]U.S. Dep't of Army, Reg. No. 190-12, Military Police Working Dogs, para. 3-3*f* (1973) [hereinafter cited as AR 190-12].

[75]AR 190-12, para. 3-3*e*.

[76]*Place*, 103 S.Ct. at 2651 (Brennan, Jr., concurring).

[77]4 M.J. 215 (C.M.A. 1978).

[78]The controlling Air Force regulation, AFR 125-5 (Oct. 1980), does not preclude use of drug detection dogs to inspect individuals. *See also* Air Force Regulation 125-19 (Aug. 1981).

[79]4 M.J. at 216.

[80]United States v. Rivera, 12 M.J. 532 (A.F.C.M.R. 1981).

[81]*Id.* at 533 n.1.

[82]*Id.*

minority view that a fourth amendment intrusion does occur. With the uncertain development of this area of search and seizure law, this position is appropriate. The rights of individual soldiers are thereby accorded the safeguards advocated by even those who are most opposed to unfounded canine sniffing.

Conclusion

Military case law and the Military Rules of Evidence have established fairly certain boundaries within which drug detection dogs are currently used. Often, these boundaries are more stringent than those followed in federal and state courts. In particular, the current requirement in M.R.E. 313(b) that unscheduled inspections for contraband be preceded by a reasonable suspicion, is a substantial difference. By extending this requirement to inspections that are assisted by detection dogs, the Rules provide more fourth amendment safeguards than are found in many jurisdictions. Whether the Supreme Court's decision in *United States v. Place* renders this prior suspicion unnecessary is unknown. The intrusiveness of canine sniffing is certainly at a minimum in most cases. In some situations, such as overseas gate inspections, military necessity completely outweighs any individual expectations of privacy; the need for suspicion prior to the use of detection dogs is thereby averted. The conclusion that *all* canine sniffing is unobtrusive for fourth amendment purposes, however, is a significant departure from this line of reasoning. Until the Supreme Court provides further classification, the military would do well to observe its self-imposed constraints on canine drug detection.

Legal Assistance Operations Reporting Format

Legal Assistance Branch, Administrative and Civil Law Division, TJAGSA

I. Introduction

Army Regulation (AR) 27-3, Legal Assistance, effective 1 April 1984, made several important changes to the Army Legal Assistance Program (ALAP). One of these changes was the institution of a legal assistance operations report. When the report is to be prepared, what periods the report is to cover, and how it is to be submitted will be determined by The Judge Advocate General. It is anticipated, however, that there will be a one-month trial reporting period in August 1984.

At the direction of The Judge Advocate General, the Legal Assistance Branch, TJAGSA, developed a legal assistance operations reporting format for consolidating office statistics from Legal Assistance Interview Records (DA Form 2465). This format was distributed to each staff judge advocate (SJA) and chief of legal assistance in January 1984. Use of this format to monitor and tabulate office statistics on a monthly basis was recommended; the substance of the report is based on information that is normally available on the Legal Assistance Interview Record. Legal assistance offices which have been using the format to gather statistics will be able to render the trial report with a minimum of effort.

The information received will enable more informed supervision and effective support of the ALAP. The statistics will also be valuable at the local level from a management standpoint, particularly during manpower surveys. Further the information will enable the Legal Assistance Branch to tailor instruction and develop materials for the field where the statistics indicate such a need exists. Finally, the statistics are required at HQDA to explain the utilization of our legal resources and our commitment to quality services to all members of the armed forces. Accordingly, accurate reporting is essential.

The statistics will be especially important if an amendment attached to S. 98-500, the Department of Defense Authorization Act for FY 1985, becomes law. The amendment, which was added as section 157 of the authorization bill, would provide a statutory basis for legal

assistance in the armed services. It was added in early June 1984 by the Senate, and must be considered by a joint conference committee.

The Legal Assistance Branch has been monitoring the use of the statistical format at several legal assistance offices and keeping track of questions receiving concerning it. A number of offices have written or called for clarification. This article will address the areas of the format that appear to be causing some confusion. Those who have not had the opportunity to work with the format should examine figure 1 before reading further.

II. General

Some general observations are in order before a more detailed explanation of the format is presented. This tool developed at TJAGSA for keeping legal assistance statistical information is a format—not a form. Many have asked why.

Creating and receiving approval for the issue and printing of a Department of the Army form is a long and tedious process. This process is worth the effort to complete, however, so long as the proponent of the form no longer has a need for flexibility. Once a form is approved and printed, it is "set in concrete." A recording and reporting format, on the other hand, remains flexible. The format, which can be reproduced locally, is merely a device for recording certain information. Should the Judge Advocate General determine that additional or completely different information be recorded and reported, the format can be easily redesigned.

The statistics that The Judge Advocate General is currently interested in reviewng are those that are reflected on the present format. These are the same statistics that are being kept and reported by the other uniformed services on a yearly basis. Discussion is ongoing among the services regarding these statistics. Until an agreement can be reached, however, Army legal assistance offices will be required to report the statistics indicated in figure 1.

The format is intended primarily to determine and to record several categories of information, namely: What legal actions are being taken by attorneys? In what areas of the law? And, for whom? This information will enable informed direction of the ALAP and effective support to the legal assistance officers (LAOs) working within it.

III. The Format

A. Administrative Data

LEGAL ASSISTANCE OPERATIONS	
Legal Assistance Office (Full address including APO, if applicable)	Period Covered
Number of Lawyers Providing Legal Assistance: Full Time _____ Part Time _____ Average Number of Lawyer Manhours Spent Providing Legal Assistance Per Week _____ (1) Number of Administrative/Clerical Personnel: _____.	

The administrative data requested on the format is fairly self explanatory. The office address, besides being a full address, will eventually include a computer identifier to be issued to each office in the near future. The computer identifier will enable analysis of statistical information by unit, office size, geographical location (CONUS/overseas), or by any combination of these variables.

The legal assistance operations report, when required, will be submitted in a manner similar to the way the JAG-2 form, DA Form 3169-R, Report of Judicial and Disciplinary Activity in the Army, is processed. Each individual legal assistance officer will submit the report through its MACOM to the Legal Assistance Office, ATTN: DAJA-LA, OTJAG, Washington, D.C., 20310. MACOMs will collect individ-

ual reports and forward then to TJAGSA. Statistics will not be consolidated at higher headquarters before being forwarded. For example, a legal assistance officer under TRADOC would forward its report through its SJA, through the TRADOC, SJA, to the Legal Assistance Branch, TJAGSA.

The format was designed to serve not only as a recording device by also as a reporting mechanism. Assembling the office statistics on a monthly basis is recommended to facilitate consolidation of individual recording periods, if necessary. The other services require yearly reports of legal assistance statistics; whether there will be a similar requirement for legal assistance offices under the ALAP has not been determined. However, reports of activities for periods of less than one month are not envisioned, and reports covering periods of longer duration may be formulated by compiling figures from the monthly statistics. Obviously, keeping office statistics on a monthly basis appears to be the best course of action.

Recording the numbers of attorneys, both full and part time, providing legal assistance is easily done, as is the recording of the number of administrative/clerical personnel. These entries may be stated in fractions to account for personnel fluctuations that occur during a reporting period. The average number of lawyer hours per week spent providing legal assistance is the final purely administrative entry.

Note 1 of the instructions that accompany the format further discusses this entry:

(1) Computation of manhours per week required. E.g. 1 lawyer providing legal assistance 3 hours per day = 15 manhours per week; 3 lawyers give legal assistance—1 full time (4 days); 1 part time, 2 hours per day (10 hours); 1 part time, 5 hours per day (25 hours) = 67 manhours per week.

Note 1 assumes an eight hour day. Thus, in the second example in Note 1, one full-time attorney devoting four days to legal assistance would accumulate thirty-two hours for reporting purposes. Adding the personnel hours of the two part-time legal assistance attorneys (ten and twenty-five, respectively) means that sixty-seven manhours were devoted to legal assistance.

B. Cases

LINE	LEGAL ASSISTANCE CASES DISPOSED OF DURING REPORTING PERIOD (2)								
	TYPE	NUMBER (3)							
		a Telephone Inquiries	b Interviews	c Prep. of Correspond.	d Prep. of Documents	REFERRAL e Military Agency	f Civilian Agency	g Civilian Bar	h TOTAL
1	Adoption/Change of Name								
2	Citizenship/Immigration								
3	Domestic Relations/Paternity								
4	Non-Support								
5	Notarizations								
6	Personal Finances								
7	Personal Property								
8	Powers of Attorney								
9	Real Property								
10	Taxation								
11	Torts								
12	Wills/Estates								
13	Miscellaneous								

The types of cases completed during the reporting period and how those cases were resolved is reflected under the heading "Legal Assistance Cases Disposed of During Reporting Period." Note 2 of the format discusses this computation:

> (2) This tabulation is of the number of legal assistance cases and not the number of clients. Hence, a client bringing in three cases would be tabulated three times hereon. Although the giving of legal assistance over the phone is discouraged, when it is necessary to do so the matter should be included in this tabulation. This is a factual report and estimates will not be used.

As the note indicates, this is to be a tabulation "of the number of legal assistance cases and not the number of clients." Thus, if during the month of April, one client came in twice, once on the 4th of April for a landlord tenant problem (solved with phone calls and a personal interview with the landlord by the attorney) and again on the 23rd of April to have a power of attorney prepared, that one client has generated two cases for the office. Both cases will be reported for the month of April because they were *resolved* during that month.

Each of the cases this client has generated must be entered on the format by type and number. Each can only be entered once. Each entry should be placed under the heading that indicates how final disposition of the case was made as described in note 3 of the instructions:

> (3) Each legal assistance case is tabulated only once under the heading indicating its final disposition, even though in most cases interviews, correspondence, etc. may have preceded its final disposition.

For example, consider the landlord tenant problem brought in by the client on the 4th of April. Assume the solution of that client's problem was accomplished by three phone calls and one personal interview with the landlord. This case would only be listed only once, and it should be tabulated under "Real Property/interviews" (line 9b of the format) since an interview was the action which resolved the case. Normally, the final action taken in a particular case is that which will be used as the "final disposition."

This last example illustrates an important factor. The format is concerned with the activities of attorneys. Work done by paralegals, legal clerks and legal secretaries is not reported on this format. All actions listed are those that are taken by an attorney on behalf of a client. Following is a discussion of each of the column entries.

"Telephone inquiries" are those made by the attorney on behalf of the client, not calls made by clerks or paralegals. Incoming calls received by the legal assistance office are not included. Note that policy remains unchanged regarding giving legal advice over the phone. Although it may be necessary under certain circumstances to provide legal advice over the phone to a client with whom the attorney has previously established an attorney-client relationship, generally it is extremely dangerous to provide legal advice over the phone and should be avoided whenever possible.

"Interviews" mean interviews by the attorney on the client's behalf which dispose of the case. It may mean, on one hand, interviews by the attorney with a third party, as in the above example. On the other hand, many times legal assistance attorneys dispose of a case simply by counseling a client. If no further action is required by the attorney, that "interview" would be tabulated under this column. If, however, other action is taken, such as referral, the case would be reported under the appropriate referral column.

"Preparation of correspondence" means correspondence prepared by the attorney. Many service members come to legal assistance offices for assistance with preparation of routine correspondence relating to a legal matter which does not require the assistance of an attorney, although the attorney may review the correspondence before the client signs it. Such routine correspondence would not be reported. Rather, only that correspondence actually drafted or prepared by the attorney which resolves the case should be reported.

"Preparation of documents" means docu-

ments prepared by the attorney which dispose of the case. Two common and recurring documents are wills and powers of attorney. Again, only when the attorney actually prepares or gives advice concerning the document should it be reported. Many legal clerks or legal secretaries routinely prepare documents (such as affidavits of nonresidency for military personnel which permit soldiers to register their automobiles in their state of assignment without being subject to the state's personal property tax). Such routine documents, prepared by legal clerks or secretaries, may be reported in the "remarks" block or on a separate sheet of paper.

"Referral" is self-explanatory. If the case is disposed of by referral to a military agency, civilian agency, or a civilian attorney, it should be reported in the appropriate column. Occasionally, it is necessary to refer a client to another military attorney or a DA civilian attorney. The format is designed to track cases disposed of per legal assistance office, not per attorney. Therefore, if referral is to a military attorney not assigned to the reporting legal assistance office, it should be tabulated as a referral to a military agency. If, however, the referral is to another military attorney assigned to the reporting legal assistance office, it would not be reported as a referral to a military agency. For example, assume that Attorney A has a client with a complicated tax problem and Attorney A has no specialized tax expertise. However, Attorney B does. If Attorney B is assigned to the administrative law section of the same SJA office and the client is referred by Attorney A to Attorney B, the case would be reported as a referral to a military agency. If, however, Attorney B is assigned to the same legal assistance office as Attorney A, it would not be reported as a referral to a military agency.

The "type" column mirrors the categories found on DA Form 2465, Legal Assistance Interview Records. Again, "notarizations" means those accomplished by attorneys. Many more notarizations are accomplished in overseas areas than in CONUS where most offices employ civilian personnel who are qualified as notaries under state laws. "Notarizations" also refers only to those documents which the attorney notarizes which are not reported elsewhere under one of the categories under "type." For example, an attorney may prepare an Acknowledgement of Paternity for a client, which the attorney also notarizes. That action would be reported once under "domestic/relations/paternity," not "notarization." Similarly, the attorney may prepare a power of attorney for a client and also notarize it. That action should only be reported once - under "powers of attorney," not "notarizations." If, however, the client brings in a document prepared by another attorney, and simply wants to have the legal assistance officer notarize that document, it would be reported under "notarizations." As the legal assistance officer in the reporting legal assistance office did not generate or prepare that document, it would not be reported under "powers of attorney."

Again, it must be emphasized that the entries in this section do not represent the total work expended by the attorney on a given problem. Rather, each entry represents how a particular case was resolved. Any actions taken by attorneys which do not lend themselves to tabulation on the format (such as preventive law classes) should be reported in the "remarks" section.

Actions accomplished by non-attorneys (most CONUS notarizations and other work done by paralegals) should be recorded under the "remarks" heading of the format or furnished on a separate sheet. A format for reporting work done by legal clerks, legal secretaries, and paralegals will be developed in the near future.

C. Clients

The final piece of information to be recorded on the format involves who legal assistance officers are representing. Note 4 of the format discusses this statistic:

> (4) This is the number of legal assistance clients serviced. Each client is tabulated only once, even though the client may have been seen more than once on a single case or more than once for several cases during the reporting period.

As the instruction indicates, each client is tabulated only once for the reporting period regardless of how many cases that client generated. In

	LEGAL ASSISTANCE CLIENTS SERVED (4)			
	TYPE/PAY GRADE		NUMBER	
	ACTIVE DUTY		LA a	CT REPb
14	E1-E4	Servicemember		
15		Family Member		
16	E5-E9	Servicemember		
17		Family Member		
18	WO-03	Servicemember		
19		Family Member		
20	04-Above	Servicemember		
21		Family Member		
22	Reserve	Servicemember		
23	Component	Family Member		
24	Retired	Servicemember		
25		Family Member		
26	Survivors			
27	DOD	Employee		
28	Civilians	Family Members		
29	Allied	Servicemember		
30		Family Member		
31	Discharged Prisoners			

the example already related, for the month of April, the client would be listed only once. That entry is made according to the category and rank of the client and also reflects whether the case was resolved through traditional legal assistance measures or via a court representation program. Assuming the client in the previous example to be a Sergeant (E-5), the entry would be made in line 16a of the format.

IV. Conclusion

Supervision and effective support of the ALAP requires knowledge of what is being done by legal assistance officers in the field. Such information will soon be reported by each legal assistance office upon direction of The Judge Advocate General. A statistical format has been developed that serves as a tool to keep legal assistance office statistics. This flexible format may be reproduced locally. The format will also serve as the means of reporting the statistics being kept, at least for the first report to be rendered. Discussion is ongoing among the uniformed services concerning what information should be reported by legal assistance offices to insure effective supervision and support.

FIGURE 1

LEGAL ASSISTANCE OPERATIONS

Legal Assistance Office (Full address including APO, if applicable) | Period Covered

Number of Lawyers Providing Legal Assistance: Full Time _____ Part Time _____

Average Number of Lawyer Manhours Spent Providing Legal Assistance Per Week _____ (1)

Number of Administrative/Clerical Personnel: _____.

LEGAL ASSISTANCE CASES DISPOSED OF DURING REPORTING PERIOD (2)

LINE	TYPE	NUMBER (3)							
		a Telephone Inquiries	b Interviews	c Prep. of Correspond.	d Prep. of Documents	REFERRAL e Military Agency	f Civilian Agency	g Civilian Bar	h TOTAL
1	Adoption/Change of Name								
2	Citizenship/Immigration								
3	Domestic Relations/Paternity								
4	Non-Support								
5	Notarizations								
6	Personal Finances								
7	Personal Property								
8	Powers of Attorney								
9	Real Property								
10	Taxation								
11	Torts								
12	Wills/Estates								
13	Miscellaneous								

LEGAL ASSISTANCE CLIENTS SERVED (4)

LINE	TYPE/PAY GRADE		NUMBER	
	ACTIVE DUTY		LA a	CT REPb
14	E1-E4	Servicemember		
15		Family Member		
16	E5-E9	Servicemember		
17		Family Member		
18	WO-03	Servicemember		
19		Family Member		
20	04-Above	Servicemember		
21		Family Member		
22	Reserve	Servicemember		
23	Component	Family Member		
24	Retired	Servicemember		
25		Family Member		
26	Survivors			
27	DOD	Employee		
28	Civilians	Family Members		
29	Allied	Servicemember		
30		Family Member		
31	Discharged Prisoners			

INSTRUCTIONS

(1) Computation of manhours per week required. E.g. 1 lawyer providing legal assistance 3 hrs. per day = 15 manhours per week; 3 lawyers give legal assistance—1 full time (6 days) 1 part time, 2 hrs. per day (10 hrs.)+ 1 part time, 5 hrs. per day (25 hrs.) = 95 manhours per week.

(2) This tabulation is of the number of legal assistance cases and not the number of clients. Hence, a client bringing in three cases would be tabulated three times hereon. Although the giving of legal assistance over the phone is discouraged, when it is necessary to do so the matter should be included in this tabulation. This is a factual report and estimates will not be used.

(3) Each legal assistance case is tabulated only once, under the heading indicating its final disposition, even though in most cases interviews, correspondence, etc. may have preceded its final disposition.

(4) This tabulation is the number of legal assistance clients served. Each client is tabulated only once, even though the client may have been seen more than once on a single case or more than once for several cases during the reporting period.

REMARKS

Typed Name, Grade and Title | Date

CLE News

1. TJAGSA CLE Course Schedule

July 9-13: 13th Law Office Management Course (7A-713A).

July 16-18: Professional Recruiting Training Seminar.

July 16-20: 26th Law of War Workshop (5F-F42).

July 16-27: 100th Contract Attorneys Course (5F-F10).

July 23-27: 12th Criminal Trial Advocacy Course (5F-F32).

July 23-September 27: 104th Basic Course (5-27-C20).

August 1-May 17, 1985: 33d Graduate Course (5-27-C22).

August 20-22: 8th Criminal Law New Developments Course (5F-F35).

August 27-31: 76th Senior Officer Legal Orientation Course (5F-F1).

September 10-14: 27th Law of War Workshop (5F-F42).

September 24-28: 3d Advanced Federal Litigation Course (5F-F29).

October 2-5: 1984 Worldwide JAG Conference.

October 15-19: 7th Claims Course (5F-F26).

October 15-December 19: 105th Basic Course (5-27-C20).

October 22-26: 13th Criminal Trial Advocacy Course (5F-F32).

October 29-November 2: 19th Fiscal Law Course (5F-F12).

November 5-9: 6th Legal Aspects of Terrorism Course (5F-F43).

November 5-9: 15th Legal Assistance Course (5F-F23).

November 26-December 7: 101st Contract Attorneys Course (5F-F10).

December 3-7: 28th Law of War Workshop (5F-F42).

December 10-14: 8th Administrative Law for Military Installations (5F-F24).

January 7-11: 1985 Government Contract Law Symposium (5F-F11).

January 14-18: 26th Federal Labor Relations Course (5F-F22).

January 21-25: 14th Criminal Trial Advocacy Course (5F-F32).

January 21-March 29: 106th Basic Course (5-27-C20).

February 4-8: 77th Senior Officer Legal Orientation Course (5F-F1).

February 11-15: 5th Commercial Activities Program Course (5F-F16).

February 25-March 8: 102nd Contract Attorneys Course (5F-F10).

March 4-8: 29th Law of War Workshop (5F-F42).

March 11-15: 9th Administrative Law for Military Installations (5F-F24).

March 11-13: 3d Advanced Law of War Seminar (5F-F45).

March 18-22: 1st Administration and Law for Legal Clerks (512-71D/20/30).

March 25-29: 16th Legal Assistance Course (5F-F23).

April 2-5: JAG USAR Workshop.

April 8-12: 4th Contract Claims, Litigation, & Remedies Course (5F-F13).

April 8-June 14: 107th Basic Course (5-27-C20).

April 15-19: 78th Senior Officer Legal Orientation Course (5F-F1).

April 22-26: 15th Staff Judge Advocate Course (5F-F52).

April 29-May 10: 103d Contract Attorneys Course (5F-F10).

May 6-10: 2nd Judge Advocate Operations Overseas (5F-F46).

May 13-17: 27th Federal Labor Relations Course (5F-F22).

May 20-24: 20th Fiscal Law Course (5F-F12).

May 28-June 14: 28th Military Judge Course (5F-F33).

June 3-7: 79th Senior Officer Legal Orientation Course (5F-F1).

June 11-14: Chief Legal Clerks Workshop (512-71D/71E/40/50).

June 17-28: JAGSO Team Training.

June 17-28: BOAC: Phase VI.

July 8-12: 14th Law Office Management Course (7A-713A).

July 15-17: Professional Recruiting Training Seminar.

July 15-19: 30th Law of War Workshop (5F-F42).

July 22-26: U.S. Army Claims Service Training Seminar.

July 29-August 9: 104th Contract Attorneys Course (5F-F10).

August 5-May 21, 1986: 34th Graduate Course (5-27-C22).

August 19-23: 9th Criminal Law New Developments Course (5F-F35).

August 26-30: 80th Senior Officer Legal Orientation Course (5F-F1).

2. Civilian Sponsored CLE Courses

October

3: IICLE, Basic Corp. Practice—New IL Business Corp. Act, Chicago, IL.

4: OKBA, Trial Practice, Tulsa, OK.

4: IICLE, Zoning, Springfield, IL.

5: IICLE, Third Party Practice, Springfield, IL.

5: WSBA, Trial Advocacy, Spokane, WA.

5: OKBA, Trial Practice, Oklahoma City, OK.

5: IICLE, Zoning, Chicago, IL.

6: CCLE, Federal Practice (Video), Cortez, CO.

7-11: NCDA, Trial Strategy & Techniques, Dallas, TX.

7-12: NJC, Evidence in Special Courts—Specialty, Reno, NV.

7-12: NJC, Alcohol and Drugs—Specialty, Reno, NV.

7-19: NJC, Non-Lawyer Judge—General, Reno, NV.

7-19: NJC, Special Court Jurisdiction—General, Reno, NV.

8: IICLE, Defense Counsel Seminar, Chicago, IL.

8: IICLE, Family Law, Chicago, IL.

9: IICLE, Third Party Practice, Chicago, IL.

10: IICLE, Faculty Training Seminars, Chicago, IL.

10-11: IICLE, Third Party Practice, Chicago, IL.

10-12: SBT, Practice Skills Course—Office Practice, Austin, TX.

14-19: NJC, Victims' Rights in Special Courts—Specialty, Reno, NV.

14-19: NJC, Sentencing Misdemeanants—Graduate, Reno, NV.

11: OKBA, Family Law (Divorce), Oklahoma City, OK.

11-12: PLI, Bankruptcy Practice & Procedure, New York, NY.

11-12: PLI, Product Warnings, Recalls & Instructions, San Francisco, CA.

11-12: PLI, Professional Liability Insurance Problems, San Francisco, CA.

11-12: IPT, Trial Preparation & Evidence, Washington, DC.

12: IICLE, Social Security, Chicago, IL.

12: IICLE, Trade Secrets, Chicago, IL.

12: WSBA, Trial Advocacy, Yakima, WA.

12-13: BNA, Family Law Conference, New York, NY.

15-16: IPT, Fact Investigation & Legal Interviewing Techniques, New York, NY.

15-16: PLI, Federal Civil Rights Litigation, New Orleans, LA.

15-16: PLI, Retirement Equity Act of 1983, San Francisco, CA.

15-17: FPI, Practical Environmental Law, Seattle, WA.

15-19: UDCL, Government Construction Contracting, Washington, DC.

16: ITP, Medical Malpractice & the Legal Assistant, Chicago, IL.

16: IICLE, Negotiating Skills, Chicago, IL.

18: ABICLE, Real Estate, Mobile, AL.

18-19: BNA, Briefing Conference on Government Contracts, San Francisco, CA.

18-19: PLI, Copyright, Patent & Trademark Litigation, Los Angeles, CA.

18-19: PLI, Estate Planning Institute, New York, NY.

18-19: SLF, Labor Law Institute, Richardson, TX.

19: ABICLE, Real Estate, Montgomery, AL.

19: IICLE, Salvation/Solo Practitioner, Chicago, IL.

19: WSBA, Trial Advocacy, Sea/Tac WA.

19-21: IICLE, Trial Bar Skills for Practicing Attorneys, Chicago, IL.

22-23: PLI, Federal Civil Rights Litigation, New Orleans, LA.

22-24: FPI, Construction Contract Litigation, San Diego, CA.

22-24: FPI, Practical Construction Law, Williamsburg, VA.

24: IICLE, Faculty Training Seminars, Chicago, IL.

24-26: FPI, Medicine in the Courtroom Family Law Services, Amarillo, TX.

25: ABICLE, Real Estate, Huntsville, AL.

26: IICLE, Child Custody, Chicago, IL.

26: ABICLE, Real Estate, Birmingham, AL.

27: IICLE, Use of Computers in Litigation, Chicago, IL.

28: IICLE, Use of Video Tape in Litigation, Chicago, IL.

28-11/1: NCDA, Office Administration & Management Course, Washington, DC.

29-11/2: TOURO, The Skills of Contract Negotiation, Washington, DC.

29-31: FPI, Proving Construction Contract Damages, Washington, DC.

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:
ROBERT M. JOYCE
Major General, United States Army
The Adjutant General

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